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Fifth report on the protection of persons in the event of disasters

by Eduardo Valencia-Ospina, Special Rapporteur

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I. Introduction*

1. The International Law Commission, at its fifty-ninth session in 2007, decided to include the topic "Protection of persons in the event of disasters" in its programme of work and appointed Mr. Eduardo Valencia-Ospina as Special Rapporteur.

2. At its sixtieth session in 2008, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/598), tracing the evolution of the protection of persons in the event of disasters, identifying the sources of the law on the topic, as well as previous efforts towards codification and development of the law in the area. It also presented in broad outline the various aspects of the general scope with a view to identifying the main legal questions to be covered and advancing tentative conclusions without prejudice to the outcome of the discussion that the report aimed to trigger in the Commission. The Commission also had before it a memorandum it had requested from the Secretariat, focusing primarily on natural disasters (A/CN.4/590 and Add.1-3) and providing an overview of existing legal instruments and texts applicable to a variety of aspects of disaster prevention and relief assistance, as well as of the protection of persons in the event of disasters.

3. The Commission considered, at its sixty-first session in 2009, the second report of the Special Rapporteur (A/CN.4/615 and Corr.1) analysing the scope of the topic *ratione materiae*, *ratione personae* and *ratione temporis*, and issues relating to the definition of "disaster" for purposes of the topic, as well as undertaking a consideration of the basic duty to cooperate. The report contained proposals for draft articles 1 (Scope), 2 (Definition of disaster) and 3 (Duty to cooperate). The Commission also had before it written replies submitted by the Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat and the International Federation of Red Cross and Red Crescent Societies (IFRC) to the questions addressed to them by the Commission in 2008.

4. At the sixty-second session of the Commission in 2010, the Special Rapporteur submitted his third report on the topic (A/CN.4/629) in which he provided an overview of the comments of States and IFRC made in the Sixth Committee of the General Assembly on the work undertaken by the Commission up to that time. He then examined the principles that inspired the protection of persons in the event of disasters, in its aspect related to persons in need of protection, and the question of the responsibility of the affected State. The report contained proposals for three further draft articles: Humanitarian principles in disaster response (6), Human dignity (7) and Primary responsibility of the affected State (8).

* The Special Rapporteur expresses his appreciation for their assistance in the preparation of the present report to the following: René Urueña, Ph.D., Director, International Law and L.L.M. Programmes, and Santiago Rojas, J.D. candidate, Faculty of Law, University of Los Andes, Bogotá; Leah Campbell, L.L.M. and Madeline Snider, J.D. candidate, New York University School of Law, New York; Christodoulos Kaoutzanis, L.L.M. Ph.D. candidate, Columbia University, New York; Emika Tokunaga, Ph.D. candidate and Visiting Researcher, School of International Public Policy, Osaka University, Osaka, Japan; Ana Polak Petric, Ph.D. candidate, European Law Faculty, Slovenia; Yann Dehaudt-Delville, L.L.M. and Magistère de Droit candidate, the Sorbonne Law School, Paris I Panthéon-Sorbonne University, Paris; Aaron Marcus, J.D. candidate, Harvard Law School, Cambridge, Mass.; Marnie Ajello, Zach Bench, Maria Valentina Castillo, Ekta Dharia, Ryan Farha, Alexandra Filippova, Sarah Fink, Ashley Gaillard, Frederic Hall, Thayer Hardwick, Hilary Harris, Mia Psorn, Justin Schwegel and Melissa Stewart, the Global Law Scholars, Class of 2013, Georgetown University Law Center, Washington, D.C.; and Paul R. Walegur, The Hague.

5. At its sixty-third session in 2011, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/643 and Corr.1) providing an overview of the views of States and IFRC expressed in the Sixth Committee on the work accomplished by the Commission thus far, a consideration of the responsibility of the affected State to seek assistance where its national response capacity is exceeded, the duty of the affected State not to arbitrarily withhold its consent to external assistance as well as the right to offer assistance in the international community. Proposals for the following three further draft articles were made in the report: draft articles 10 (Duty of the affected State to seek assistance), 11 (Duty of the affected State not to arbitrarily withhold its consent) and 12 (Right to offer assistance).

6. At its sixty-first session in 2009, the Commission, at the 3029th meeting, on 31 July 2009, took note of draft articles 1 to 5, as provisionally adopted by the Drafting Committee (see A/CN.4/L.758). The Commission, at its 3067th meeting, on 20 July 2010, took note of draft articles 6 to 9, as provisionally adopted by the Drafting Committee (A/CN.4/L.776).

7. Also at its sixty-second session (2010), the Commission, at the 3057th meeting, on 4 June 2010, adopted the report of the Drafting Committee on draft articles 1 to 5, which had been considered at the Commission's previous session. Commentaries to draft articles 1 to 5 were likewise adopted by the Commission at its 3072nd meeting, on 2 August 2010. The text of draft articles 1 to 5, with commentaries, was reproduced in chapter VII.C of the report of the Commission on the work of its sixty-second session (A/65/10).

8. The Commission, at its sixty-third session in 2011, adopted, at the 3102nd meeting, on 11 July 2011, the report of the Drafting Committee on draft articles 6 to 9, which had been considered at the Commission's previous session. The Commission further adopted the report of the Drafting Committee on draft articles 10 and 11 at the 3116th meeting, on 2 August 2011. At its 3122nd meeting, on 9 August 2011, the Commission adopted commentaries to draft articles 6 to 11. The text of draft articles 6 to 11, with commentaries, was reproduced in chapter IX.C of the Commission's report on the work of its sixty-third session (A/66/10).

9. Also at its sixty-third session, the Commission, at the 3107th meeting, on 18 July 2011, referred to the Drafting Committee draft article 12, together with draft articles 10 and 11, proposed by the Special Rapporteur in his fourth report. However, owing to the lack of time, the Drafting Committee could not provisionally adopt draft article 12 at that session.

II. Comments made in the Sixth Committee by States and organizations

10. At the sixty-sixth session of the General Assembly, the Sixth Committee, at its 18th to 28th meetings, from 24 October to 4 November 2011, considered under agenda item 81 the report of the International Law Commission on the work of its sixty-third session, chapter IX of which concerned the topic "Protection of persons in the event of disasters" (A/66/10, paras. 264-289). The interventions of representatives concentrated on the text of draft articles 5 to 11 and commentaries thereto already adopted by the Commission (see A/65/10, para. 330, and A/66/10,

para. 289), as well as on the content of draft article 12 as proposed by the Special Rapporteur in his fourth report (A/CN.4/643 and Corr.1, para. 109). Representatives also referred to the points related to the present topic included in chapter III (sect. C, paras. 43 and 44) of the Commission's report, entitled "Specific issues on which comments would be of particular interest to the Commission".

11. In paragraph 43 of its report, the Commission reiterated that it would welcome any information concerning the practice of States under the present topic, including examples of domestic legislation, in particular information and comments on specific legal and institutional problems encountered in dealing with or responding to disasters. In this respect Austria,[1] Hungary[2] and Indonesia[3] made reference to their national legislation dealing with disaster relief. The European Union[4] elaborated on its instruments in the field of humanitarian assistance and civil protection, while the International Federation of Red Cross and Red Crescent Societies (IFRC)[5] highlighted some of the most recent developments in its activities related to International Disaster Response Law (IDRL).

A. General comments

12. As in previous years, the debate in the Sixth Committee evidenced the great interest of States and organizations in the topic.[6] Delegations in general welcomed the progress achieved by the Commission in a short time, emphasizing the importance and timeliness of the topic in the light of the rising number of losses produced by natural disasters.[7] They recognized that the Commission's work of codification and progressive development would greatly contribute to the development of disaster response law and commended its efforts in clarifying the specific legal framework pertaining to access in disaster situations, the inclusion of the fundamental principles governing disaster relief and the recognition of several duties on the part of affected States.[8] Several States acknowledged that such undertaking would help to improve the efficiency and quality of humanitarian assistance and mitigate the consequences of disasters.[9] One delegation, for example, noted that "The Commission had chosen to focus on matters of great current significance and had shown itself to be in tune with existing trends in international practice".[10]

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[1] A/C.6/66/SR.23, para. 23.
[2] A/C.6/66/SR.24, para. 58.
[3] A/C.6/66/SR.24, para. 71.
[4] A/C.6/66/SR.21, paras. 53 and 54.
[5] A/C.6/66/SR.25, para. 45.
[6] The present summary of the discussion in the Sixth Committee identifies by name the delegations making statements, with reference to the corresponding summary records of the Sixth Committee.
[7] Slovenia (A/C.6/66/SR.20, para. 11), Poland (A/C.6/66/SR.21, para. 83), Italy (A/C.6/66/SR.21, para. 91), Colombia (A/C.6/66/SR.22, para. 25), Ireland (A/C.6/66/SR.25, para. 20), Egypt (A/C.6/66/SR.25, para. 36), Switzerland (A/C.6/66/SR.18, para. 42).
[8] Poland (A/C.6/66/SR.21, para. 84), El Salvador (A/C.6/66/SR.22, para. 11), Niger (A/C.6/66/SR.23, para. 54), European Union (A/C.6/66/SR.21, paras. 52 and 55).
[9] Romania (A/C.6/66/SR.25, para. 17), Japan (A/C.6/66/SR.25, para. 25).
[10] Switzerland (A/C.6/66/SR.18, para. 42).

13. As a general remark and a point of departure for the debate on specific draft articles, several representatives praised the Commission for striking the proper balance between the need to protect the persons affected by disasters and the respect for the principles of State sovereignty and non-interference.[11] Some delegations underlined that response to disasters, and consequently the draft articles prepared by the Commission, should always be based on full respect for the sovereignty of the affected State and should not allow humanitarian assistance to be politicized or be made an excuse for interfering in the internal affairs of the affected State.[12] The importance of international solidarity in the event of disasters was also emphasized.[13]

14. While the Commission's recognition of the role of international organizations and other humanitarian actors in the protection of persons in the event of disasters was welcomed, it was deemed unclear whether the respective draft articles also included regional integration organizations, such as the European Union.[14]

15. Furthermore, it was suggested that the proposed scope of the draft articles was too narrow with respect to the events to be covered and, therefore, it should be extended to a wider range of pre-disaster activities relating to risk reduction, prevention, preparedness and mitigation.[15] It was also felt that the draft articles themselves should focus on operational matters.[16] In addition, it was stressed that non-binding guidelines or a framework of principles for States and other parties engaged in disaster relief would be more practical and more likely to enjoy wide support.[17]

16. Delegations endorsed the Commission's view based on the position of the Secretary-General of the United Nations (A/63/677, para. 10 (b)) that the concept of "responsibility to protect" fell outside the scope of the topic and applied only to four specific crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.[18] For the Secretary-General, extending the concept of "responsibility to protect" to include the response to natural disasters would stretch it beyond recognition or operational utility. Nevertheless, one delegation maintained that since "responsibility to protect" was among the most dynamically developing and

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[11] Slovenia (A/C.6/66/SR.20, para. 11), Colombia (A/C.6/66/SR.22, para. 25), Sri Lanka (A/C.6/66/SR.27, para. 18).

[12] China (A/C.6/66/SR.23, para. 41), Malaysia (A/C.6/66/SR.24, para. 112), Indonesia (A/C.6/66/SR.24, para. 70), Egypt (A/C.6/66/SR.25, para. 36).

[13] Japan (A/C.6/66/SR.25, para. 25).

[14] European Union (A/C.6/66/SR.21, para. 57).

[15] Poland (A/C.6/66/SR.21, para. 84).

[16] Ireland (A/C.6/66/SR.25, para. 20). See also IFRC (A/C.6/66/SR.25, para. 42) (noting the significant operational problems as a result of the involvement of foreign actors that lacked the requisite skills).

[17] United Kingdom of Great Britain and Northern Ireland (A/C.6/66/SR.23, para. 45), Russian Federation (A/C.6/66/SR.24, para. 37).

[18] Colombia (A/C.6/66/SR.22, para. 25), Thailand (A/C.6/66/SR.24, para. 89), Japan (A/C.6/66/SR.25, para. 26), Sri Lanka (A/C.6/66/SR.27, para. 18). See also below comments made on draft article 9, especially by France (A/C.6/66/SR.23, para. 38) and China (A/C.6/66/SR.23, para. 42).

innovative concepts in international relations, further careful consideration should be given to the appropriateness of extending it to natural disasters.[19]

B. Draft articles 5, 6, 7 and 8

17. On draft article 5 (Duty to cooperate), States emphasized its importance since cooperation was essential to successful disaster relief and protection of persons in need.[20] Nevertheless, a call for further clarification of draft article 5 was made, in order to enable States to understand the extent of their obligations.[21]

18. With respect to draft article 6 (Humanitarian principles in disaster response), the Special Rapporteur was commended for recognizing the core role played by the principles of humanity, neutrality, impartiality and non-discrimination in the coordination and implementation of disaster relief.[22] Support was expressed for the Commission's view in the commentary that it was not necessary to determine whether the three humanitarian principles of humanity, neutrality and impartiality in the draft article were general principles of international law.[23] The suggestion was made to clarify the term "the particularly vulnerable" concerning the application of humanitarian principles in disaster response.[24]

19. One delegation favoured formulating a new draft article to reflect the principles of the Charter of the United Nations and the guiding principles of humanitarian assistance set out in General Assembly resolution 46/182.[25]

20. Two delegations proposed that draft articles 7 and 8, as they addressed key principles, should be better placed at the beginning of the text of the future instrument or in its preamble.[26]

21. Draft article 7 (Human dignity) was deemed especially significant, since it was the first time that it had appeared as an autonomous provision in the body of a future international instrument and it stood as a reminder that the protection of human beings lay at the heart of the topic. It was pointed out that, as recognized in the corresponding commentary, the duty to "respect and protect" was very broad, encompassing both a negative obligation to refrain from injuring the dignity of the human person and a positive obligation to maintain that dignity. The State, given its primary role in disaster response, also had the primary role in fulfilling that duty.[27]

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[19] Poland (A/C.6/66/SR.21, para. 85) argued that although the concept today applies only in the four specific cases mentioned by the Secretary-General, it includes an important reservation: only "until members decide otherwise". In its opinion, the magnitude of threats and losses from natural disasters now meant that the time was ripe for "deciding otherwise" and undertaking the challenge of extending the concept to include natural catastrophes.

[20] Slovenia (A/C.6/66/SR.20, para. 11), China (A/C.6/66/SR.23, para. 41), Islamic Republic of Iran (A/C.6/66/SR.24, para. 51), Austria (A/C.6/66/SR.23, para. 25), Israel (A/C.6/66/SR.23, para. 33), Thailand (A/C.6/66/SR.24, para. 92), Romania (A/C.6/66/SR.25, para. 17).

[21] Cuba (A/C.6/66/SR.24, para. 26), Malaysia (A/C.6/66/SR.24, para. 120).

[22] United States of America (A/C.6/66/SR.21, para. 69).

[23] Algeria (A/C.6/66/SR.25, para. 31).

[24] Niger (A/C.6/66/SR.23, para. 54).

[25] Cuba (A/C.6/66/SR.24, para. 26).

[26] Republic of Korea (A/C.6/66/SR.24, para. 82), Ireland (A/C.6/66/SR.25, para. 20).

[27] Colombia (A/C.6/66/SR.22, para. 26).

22. With regard to draft article 8 (Human rights), it was said that in comparison to draft article 7, its wording was too general and vague and raised questions regarding its scope and interpretation.[28] The view was also expressed that the commentary should elaborate further on the meaning of human rights by referring to the protection of rights relating to the provision of food, health, shelter and education, housing, land and property, livelihoods and secondary and higher education; and documentation, movement, re-establishment of family ties, expression and opinion, and elections.[29]

C. Draft article 9

23. Draft article 9 (Role of the affected State), premised on the core principle of State sovereignty and establishing a duty of the affected State to ensure the protection of persons and the provision of relief and assistance on its territory, met with general approval of States in the Sixth Committee.[30] Although the affected State was best placed to assess its needs in that regard, its responsibility should not remain exclusive.[31] Additional consideration should be given to the affected State's duty towards the international community as a whole since inaction could have effects not only on its own territory but on that of its neighbours.[32] The use of the term "duty" in draft article 9 was welcomed for various reasons, especially in order to avoid any confusion with the concept of "responsibility"[33] and as the appropriate means of reconciling the two desiderata of preserving State sovereignty and protecting the affected population.[34] It was also said that the text would benefit from a specific reference to persons with disabilities.[35]

D. Draft article 10

24. Concerning draft article 10 (Duty of the affected State to seek assistance), many delegations welcomed establishing as legal, and not as moral or political, the duty of the affected State to seek assistance. They agreed that the duty established therein derived from the affected State's obligations under international human rights instruments and customary international law and that the protection of various human rights directly implicated in the context of disasters, such as the right to life,

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[28] Algeria (A/C.6/66/SR.25, para. 32).

[29] Thailand (A/C.6/66/SR.24, para. 89).

[30] United States of America (A/C.6/66/SR.21, para. 69), Colombia (A/C.6/66/SR.22, para. 27), France (A/C.6/66/SR.23, para. 38), Netherlands (A/C.6/66/SR.23, para. 48), China (A/C.6/66/SR.23, para. 42), Chile (A/C.6/66/SR.24, para. 8), Argentina (A/C.6/66/SR.25, para. 10), Romania (A/C.6/66/SR.25, para. 17), Ireland (A/C.6/66/SR.25, para. 21), Algeria (A/C.6/66/SR.25, para. 31), European Union (A/C.6/66/SR.21, para. 55). Pakistan (A/C.6/66/SR.25, para. 6) characterized draft article 9 as the most essential provision of the draft articles implying the preference given to domestic law.

[31] Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60).

[32] Romania (A/C.6/66/SR.25, para. 17).

[33] France (A/C.6/66/SR.23, para. 38), China (A/C.6/66/SR.23, para. 42), Algeria (A/C.6/66/SR.25, para. 31).

[34] Colombia (A/C.6/66/SR.22, para. 27).

[35] Greece (A/C.6/66/SR.24, para. 24).

food, health and medical care, was essential.[36] In this connection, it was recommended that among the human rights listed in the commentary a reference to the right to access to fresh water should be added.[37]

25. Since the affected State did not have unlimited discretion regarding its consent to external assistance, which it was obliged to seek if the disaster exceeded its response capacity, a suggestion was made that situations in which the affected State might be unwilling to provide assistance and protection should also be addressed.[38]

26. Attention was drawn to the Preamble of the European Union's Council Regulation No. 1257/96 concerning humanitarian aid, which stated: "people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances have a right to international humanitarian assistance where their own authorities prove unable to provide effective relief".[39]

27. It was suggested that the fact that the Government of an affected State was in the best position to determine the severity of a disaster and the limits of its own response capacity be reflected in the text of draft article 10.[40]

28. On the other hand, a number of States opposed the idea that the affected State was placed under a legal obligation to seek external assistance in cases where a disaster exceeded its national response capacity. In their view, the imposition of such a duty constituted infringement of the sovereignty of States as well as of international cooperation and solidarity and had no basis in existing international law, customary law or State practice. It was preferable that the provision of draft article 10 be reworded in hortatory terms, namely, to use instead of the mandatory phrase "duty to seek assistance" the formulation "should seek assistance".[41]

29. As stated by one delegation, the relationship between the affected State and the international community in disaster situations should not be defined in terms of rights and duties, but should rather be considered from the perspective of international cooperation not only in draft article 10 but also in draft articles 11, paragraph 2, and 12.[42]

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[36] Slovenia (A/C.6/66/SR.20, para. 11), Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60), El Salvador (A/C.6/66/SR.22, para. 12), Colombia (A/C.6/66/SR.22, para. 27), Czech Republic (A/C.6/66/SR.23, para. 19), Chile (A/C.6/66/SR.24, para. 8), India (A/C.6/66/SR.25, para. 13), Romania (A/C.6/66/SR.25, para. 18), Ireland (A/C.6/66/SR.25, para. 21), Egypt (A/C.6/66/SR.25, para. 36), European Union (A/C.6/66/SR.21, para. 56), IFRC (A/C.6/66/SR.25, para. 41).

[37] Greece (A/C.6/66/SR.24, para 25).

[38] Netherlands (A/C.6/66/SR.23, para. 48), Slovenia (A/C.6/66/SR.20, para. 11), Portugal (A/C.6/66/SR.24, para. 66).

[39] European Union (A/C.6/66/SR.21, para. 56).

[40] France (A/C.6/66/SR.23, para. 38).

[41] Austria (A/C.6/66/SR.23, para. 23), Israel (A/C.6/66/SR.23, para. 33), France (A/C.6/66/SR.23, para. 38), China (A/C.6/66/SR.23, para. 42), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48), Greece (A/C.6/66/SR.24, para. 25), Cuba (A/C.6/66/SR.24, para. 26), Russian Federation (A/C.6/66/SR.24, para. 37), Islamic Republic of Iran (A/C.6/66/SR.24, para. 50), Portugal (A/C.6/66/SR.24, para. 66), Indonesia (A/C.6/66/SR.24, para. 70), Republic of Korea (A/C.6/66/SR.24, para. 82), Thailand (A/C.6/66/SR.24, para. 90), Malaysia (A/C.6/66/SR.24, para. 114), Pakistan (A/C.6/66/SR.25, para. 7), Argentina (A/C.6/66/SR.25, para. 10), Algeria (A/C.6/66/SR.25, para. 33), Sri Lanka (A/C.6/66/SR.27, para. 19).

[42] China (A/C.6/66/SR.23, para. 42).

30. Some delegations drew attention to the importance of the last part of draft article 10, namely, that the affected State was free to choose among the various enumerated external actors offering assistance, as indicated by the phrase "as appropriate".[43] In that connection, the view was expressed that inclusion of the words "as appropriate" in the draft article contributed to strengthening the affected State's discretion in determining and choosing the best assistance provider, since an affected State was in the best position to determine the gravity of an emergency situation on its territory and to frame appropriate responses.[44] Conversely, a suggestion was made to exclude those words, so as to emphasize the discretionary power of the affected State.[45]

31. The opinion was expressed that the clause "to the extent that a disaster exceeds its national response capacity" raised questions as to the manner in which the national response capacity was assessed, and therefore it should be further elaborated.[46] In that connection, support was voiced for reverting to the wording originally proposed by the Special Rapporteur in his fourth report, "if the disaster exceeds its national response capacity".[47]

32. There were some additional suggestions in respect of draft article 10. One delegation proposed that the draft article should be reworded, so as to make it clear that States were free to request assistance from any of the enumerated actors or from others not mentioned in the draft article in the light of general human rights law.[48] For some delegations, it would be useful to provide incentives for the affected State to seek assistance at an even earlier stage in order to avoid delays in the provision of assistance.[49] It was also said that a distinction should be made between States and international organizations, on the one hand, and relevant non-governmental organizations on the other, since it was not incumbent on the affected State to seek assistance from the latter.[50]

E. Draft article 11

33. It was suggested that the words "without prejudice to article 10" be added at the beginning of draft article 11 (Consent of the affected State to external assistance) for the sake of harmony.[51]

34. General agreement was expressed with paragraph 1 of draft article 11, which reflected the core principle, fundamental to international law, that implementation of international relief assistance was contingent upon the consent of the affected State,

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[43] Slovenia (A/C.6/66/SR.20, para.11), Chile (A/C.6/66/SR.24, para. 8), Malaysia (A/C.6/66/SR.24, para. 115).

[44] Malaysia (ibid).

[45] Thailand (A/C.6/66/SR.24, para. 90), International Federation of Red Cross and Red Crescent Societies (A/C.6/66/SR.25, paras. 41 and 42).

[46] El Salvador (A/C.6/66/SR.22, para. 12).

[47] Netherlands (A/C.6/66/SR.23, para. 48).

[48] IFRC (A/C.6/66/SR.25, para. 41).

[49] Italy (A/C.6/66/SR.21, para. 91), El Salvador (A/C.6/66/SR.22, para. 12).

[50] Islamic Republic of Iran (A/C.6/66/SR.24, para. 52), Argentina (A/C.6/66/SR.25, para. 10).

[51] Thailand (A/C.6/66/SR.24, para. 91).

which was fully in line with the principle of State sovereignty.[52] However, concern was manifested at imposing such a legal obligation, which could undermine the current practice of international cooperation and solidarity.[53]

35. The opinion was expressed that although the requirement to obtain the consent of the affected State was reasonable, it could cause delay in cases where rapid reaction was needed.[54] It was also stated that draft article 11 should categorically refuse to allow consent to be implied or dispensed completely in situations where a lack of consent would not bar the provision of assistance. The situation where there was no functioning government to provide consent might be acceptable from a humanitarian standpoint but raised questions as to who should decide whether a government, functioning or otherwise, existed.[55]

36. A number of States welcomed paragraph 2 of draft article 11 which stipulates that the consent to external assistance by the affected State should not be withheld arbitrarily, underlying that the affected State had both a right and a duty to assist its own population.[56]

37. In the opinion of one delegation, an additional study on the relationship between international cooperation and international principles would be helpful in establishing possible derogations to those of sovereignty and non-intervention. A State should bear the responsibility for its refusal to accept assistance, since such a refusal could give rise to an internationally wrongful act if it undermined the rights of the affected persons under international law.[57] It was explained by another delegation that the duties to cooperate, to seek assistance and to refrain from arbitrarily withholding consent imposed an obligation of conduct or means, not of result, on the affected State, which was obliged to give good faith consideration to the possibility of accepting assistance from another State or from an international actor and could not withhold its consent arbitrarily.[58] Another delegation concurred with this provision of draft article 11 but warned that under existing international law other States would not be able to act without the consent of the affected State, even if the latter incurred international responsibility by refusing assistance.[59]

38. Some delegations insisted that, based on the principle of sovereignty, the affected State had a right to decide whether to request or accept humanitarian assistance and that no customary international law or State practice provided for the

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[52] Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60), El Salvador (A/C.6/66/SR.22, para. 13), Colombia (A/C.6/66/SR.22, para. 27), Czech Republic (A/C.6/66/SR.23, para. 19), Austria (A/C.6/66/SR.23, para. 24), Israel (A/C.6/66/SR.23, para. 33), France (A/C.6/66/SR.23, para. 39), Niger (A/C.6/66/SR.25, para. 54), Chile (A/C.6/66/SR.24, para. 9), India (A/C.6/66/SR.25, para. 13), Romania (A/C.6/66/SR.25, para. 19), Pakistan (A/C.6/66/SR.25, para. 6), Ireland (A/C.6/66/SR.25, para. 22), Egypt (A/C.6/66/SR.25, para. 36), Sri Lanka (A/C.6/66/SR.27, para. 20), European Union (A/C.6/66/SR.21, para. 56), IFRC (A/C.6/66/SR.25, para. 43).

[53] China (A/C.6/66/SR.23, para. 42), Russian Federation (A/C.6/66/SR.24, para. 37), Portugal (A/C.6/66/SR.24, para. 66), Pakistan (A/C.6/66/SR.25, para. 7).

[54] Niger (A/C.6/66/SR.23, para. 54).

[55] Malaysia (A/C.6/66/SR.24, para. 116).

[56] Finland (on behalf of the Nordic States) (A/C.6/66/SR.21 para. 60), El Salvador (A/C.6/66/SR.22, para. 13), Spain (A/C.6/66/SR.23, para. 50).

[57] Portugal (A/C.6/66/SR.24, para. 66).

[58] Colombia (A/C.6/66/SR.22, para. 27).

[59] Austria (A/C.6/66/SR.23, para. 24).

obligation on the part of an affected State to accept outside assistance.[60] One delegation preferred that the draft articles, rather than imposing a strictly legal obligation that would entail international legal consequences in the event of non-compliance, should determine that the affected State had simply a moral and political duty to seek assistance and not to withhold arbitrarily its consent to external assistance.[61]

39. A number of delegations considered that the term "arbitrarily" in paragraph 2 of the draft article could give rise to difficulties of interpretation, including the questions on how arbitrary refusal would be determined, who was to make such an assessment, or what its consequences would be, among others, and therefore it should be clarified in both the text and the commentary.[62]

40. Some delegations made concrete suggestions of a textual nature. Thus, it was felt worth considering whether the term "unreasonably" should be substituted for "arbitrarily".[63] Also, to add an explanation to the text as follows: "Consent is considered to be arbitrary, in particular when in contravention of article 8".[64] In the opinion of one delegation, no refusal was arbitrary, for instance, if the affected State had previously accepted appropriate assistance from another source. In its view, the necessary guarantees should be provided, including by underlining the relevant principles of the Charter of the United Nations, to ensure that the cause of humanitarian assistance was not abused with a view to undermining the sovereign rights of the affected State and interfering in its internal affairs. It was, thus, suggested that paragraph 2 should be amended to read: "Consent to external assistance offered in good faith and exclusively intended to provide humanitarian assistance shall not be withheld arbitrarily and unjustifiably".[65]

41. With reference to paragraph 3 of article 11, some States argued that the expression "whenever possible" could raise difficulties in communicating the decision regarding the acceptance of assistance, adversely affecting populations in urgent need of such assistance. The affected State's discretion in communicating such decision should be narrowed in order to cover cases where a decision proved impossible. It would help to clarify who was expected to make a formal offer of assistance to the affected State.[66]

42. One delegation proposed to divide paragraph 3 in order to express two distinct ideas: first, that the State had a duty to communicate its response to an offer of assistance in a timely manner; and, second, that in extreme situations States might, for good cause, not be able to respond immediately, or indeed at all, to an offer of

[60] Cuba (A/C.6/66/SR.24, para. 27), Indonesia (A/C.6/66/SR.24, para. 70), China (A/C.6/66/SR.23, para. 42).

[61] Russian Federation (A/C.6/66/SR.24, para. 37).

[62] Israel (A/C.6/66/SR.23, para. 33), France (A/C.6/66/SR.23, para. 39), China (A/C.6/66/SR.23, para. 42), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48). Malaysia (A/C.6/66/SR.24, paras. 117-119), Argentina (A/C.6/66/SR.25, para. 10), Ireland (A/C.6/66/SR.25, para. 22), Algeria (A/C.6/66/SR.25, para. 33) and Sri Lanka (A/C.6/66/SR.27, para. 20).

[63] Netherlands (A/C.6/66/SR.23, para. 48).

[64] Greece (A/C.6/66/SR.24, para. 25).

[65] Islamic Republic of Iran (A/C.6/66/SR.24, para. 52), Thailand (A/C.6/66/SR.24, para. 91).

[66] El Salvador (A/C.6/66/SR.22, para. 13), France (A/C.6/66/SR.23, para. 39), Portugal (A/C.6/66/SR.24, para. 66), Thailand (A/C.6/66/SR.24, para. 91), IFRC (A/C.6/66/SR.25, para. 43).

assistance.[67] It was explained that neither the Red Cross and Red Crescent Movement nor foreign non-governmental organizations tend to make formal offers of assistance to States. It was also stated that it was unclear in draft article 11 whether there was an implied temporal deadline for responding to offers of assistance.[68]

43. The suggestion was made that the order of draft articles 11 and 12 should be reversed, with the right of third States and other entities to offer assistance being stated first.[69]

F. The right to offer assistance (proposed draft article 12)

44. A number of delegations addressed the inclusion of a further draft article on the right of assisting actors to offer assistance to the affected State, as proposed by the Special Rapporteur in his fourth report (proposed draft article 12) (A/CN.4/643 and Corr.1, para. 109). As already explained (see para. 9 above), proposed article 12 has been considered by the Commission in plenary, which referred it to the Drafting Committee. Agreement was expressed by many States with such proposal, maintaining that it acknowledged the interest of the international community in the protection of persons in the event of a disaster, which should be viewed as complementary to the primary responsibility of the affected State and as an expression of solidarity and cooperation and not as interference in its internal affairs. It was stressed that this right of assisting actors was merely to "offer", not to "provide", assistance and the affected State remained, in line with the principle of sovereignty and notwithstanding draft articles 10 and 11, free to accept in whole or in part any offers of assistance from States and non-State actors, whether made unilaterally or in answer to an appeal.[70] A suggestion was made that the proposed draft article should be reformulated so as to extend the right to offer assistance to all persons, both natural and legal.[71]

45. One delegation added that offers of assistance should not be considered as interference in the internal affairs of the affected State, provided that the assistance offered did not affect the latter's sovereignty or its primary role in the direction, control, coordination and supervision of such assistance.[72] A suggestion was made to formulate this provision as a positive duty of the international community, this being a part of international cooperation.[73] In that connection, it was stressed that draft article 5 already established a duty of cooperation on the part of all actors; therefore draft articles 5 and 12, taken together, would put States and other actors under some pressure to offer assistance, which was only to be welcomed.[74]

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[67] El Salvador (ibid.).

[68] IFRC (A/C.6/66/SR.25, para. 43).

[69] Netherlands (A/C.6/66/SR.23, para. 48).

[70] Slovenia (A/C.6/66/SR.20, para. 12), Finland (on behalf of the Nordic States) (A/C.6/66/SR.21, para. 60), Poland (A/C.6/66/SR.21, para. 86), Mexico (A/C.6/66/SR.22, para. 20), Czech Republic (A/C.6/66/SR.23, para. 19), Austria (A/C.6/66/SR.23, para. 25), Chile (A/C.6/66/SR.24, para. 10), Romania (A/C.6/66/SR.25, para. 19), Egypt (A/C.6/66/SR.25, para. 36).

[71] El Salvador (A/C.6/66/SR.22, para. 14).

[72] Chile (A/C.6/66/SR.24, para. 10).

[73] Thailand (A/C.6/66/SR.24, para. 92), Sri Lanka (A/C.6/66/SR.27, para. 20).

[74] Austria (A/C.6/66/SR.23, para. 25).

46. Some delegations, however, agreed only with the general premise articulated in the draft article and urged to limit its applicable scope and conditions, without undermining the principle of non-interference in the internal affairs of the affected State.[75] In that connection, it was suggested that the scope should be reduced to the "offer of assistance".[76]

47. A number of States considered that the role of the international community in offering assistance to affected States should not be defined as an assertion of rights, and therefore should be reformulated on the basis of the principles of international cooperation and solidarity.[77] Some also emphasized that the focus should be on the duty of the affected State to give consideration to offers of assistance, rather than as a legal right.[78] It was also stated that the right to offer assistance set out in draft article 12 had no evident independent value but simply recognized the reality in disaster situations.[79]

48. Moreover, in the view of some of delegations, it was appropriate to consider whether all of the actors mentioned in the text should be placed on the same juridical footing, since only subjects of international law were entitled to exercise the right to offer assistance.[80] In that connection, it was noted that those three groups of actors had been placed in the same category in draft article 7 on human dignity.[81]

49. It was also pointed out that IFRC and its national societies did not fall within the categories mentioned in draft article 12.[82] In addition, as already mentioned (see above, para. 14), it was felt necessary to consider whether the term "competent intergovernmental organizations" extended to regional integration organizations, such as the European Union.[83]

50. For some delegations, the provision was superfluous since States already had a sovereign right to make such offers in practice.[84] One delegation suggested that owing to the diverging views, the Commission should avoid a definitive

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[75] Poland (A/C.6/66/SR.21, para. 86), Mexico (A/C.6/66/SR.22, para. 20), Austria (A/C.6/66/SR.23, para. 25), Chile (A/C.6/66/SR.24, para. 10), Romania (A/C.6/66/SR.25, para. 19)

[76] Austria (A/C.6/66/SR.23, para. 25).

[77] United States of America (A/C.6/66/SR.21, para. 69), Singapore (A/C.6/66/SR.21, para. 75), El Salvador (A/C.6/66/SR.22, para. 14), Germany (A/C.6/66/SR.23, para. 28), Israel (A/C.6/66/SR.23, para. 33), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48), Russian Federation (A/C.6/66/SR.24, para. 37), Portugal (A/C.6/66/SR.24, para. 66), Thailand (A/C.6/66/SR.24, para. 92), Pakistan (A/C.6/66/SR.25, para. 7), Sri Lanka (A/C.6/66/SR.27, para. 20), IFRC (A/C.6/66/SR.25, para. 44).

[78] Singapore (A/C.6/66/SR.21, para. 75), Thailand (A/C.6/66/SR.24, para. 92).

[79] Russian Federation (A/C.6/66/SR.24, para. 37).

[80] Singapore (A/C.6/66/SR.21, para. 75), Mexico (A/C.6/66/SR.22, para. 20), Czech Republic (A/C.6/66/SR.23, para. 19), Germany (A/C.6/66/SR.23, para. 28), Islamic Republic of Iran (A/C.6/66/SR.24, para. 52), Pakistan (A/C.6/66/SR.25, para. 7), European Union (A/C.6/66/SR.21, para. 57).

[81] Czech Republic (ibid.).

[82] IFRC (A/C.6/66/SR.25, para. 44).

[83] European Union (ibid.).

[84] United Kingdom (A/C.6/66/SR.23, para. 45), Russian Federation (A/C.6/66/SR.24, para. 37).

pronouncement on those issues in the interest of facilitating the development of a product that would be of the most practical use to the international community.[85]

G. Duty to provide assistance (question posed by the Commission in chapter III.C of its 2011 annual report)

51. The Commission, at the penultimate meeting of its 2011 session (3126th meeting), on 11 August 2011, and in the absence of the Special Rapporteur on the topic "Protection of persons in the event of disasters", agreed to the proposal of one member[86] to also include in section C of chapter III of its report on the session, entitled "Specific issues on which comments would be of particular interest to the Commission", the following question addressed to States:

> "The Commission has taken the view that States have a duty to cooperate with the affected State in disaster relief matters. Does this duty to cooperate include a duty on States to provide assistance when requested by the affected State?" (A/66/10, chap. III, para. 44).

52. No written replies to the above question had been received from States by the date of the present report. However, in the Sixth Committee, the many States that spoke on the point responded in the negative to the question posed, mainly arguing that such a duty had no basis in existing international law, customary law or practice, and that the creation of such a new duty would not only be controversial but would give rise to numerous legal and practical problems.[87]

53. The view was expressed that the duty to cooperate should in this context be understood simply as a duty to consider requests for assistance made by the affected State, and was conditional upon a decision by the affected State that it required assistance and also upon the capacity of the assisting State to provide the assistance requested.[88] Some suggestions were advanced to formulate the provision in a way to encourage or strongly recommend to non-affected actors cooperation and assistance on the basis of the principles of cooperation and international solidarity,[89] or to only oblige States to "respond promptly" to a request made by the affected State. In the latter respect, reference was made to article 4 of the 2005 Agreement of the Association of Southeast Asian Nations (ASEAN) on Disaster Management and Emergency Response.[90] It was also underlined that the question posed would have an impact on the practical operation of draft articles 10 and 11, since the duty to seek assistance in the event of disasters would need to be mutually supported by a corresponding duty to assist. Nevertheless, a binding obligation on States to provide

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[85] United States of America (A/C.6/66/SR.21, para. 69).

[86] See A/CN.4/SR.1326.

[87] Mexico (A/C.6/66/SR.18, para. 55, and A/C.6/66/SR.22, para. 21), Slovenia (A/C.6/66/SR.20, para. 12), Singapore (A/C.6/66/SR.21, para. 76), Italy (A/C.6/66/SR.21, para. 91), Colombia (A/C.6/66/SR.22, para. 28), Austria (A/C.6/66/SR.23, para. 23), Germany (A/C.6/66/SR.23, para. 28), United Kingdom (A/C.6/66/SR.23, para. 45), Netherlands (A/C.6/66/SR.23, para. 48), Spain (A/C.6/66/SR.23, para. 50), Hungary (A/C.6/66/SR.24, para. 59), Malaysia (A/C.6/66/SR.24, para. 120), Republic of Korea (A/C.6/66/SR.24, paras. 120 and 121), Ireland (A/C.6/66/SR.25, para. 21).

[88] Mexico (A/C.6/66/SR.18, para. 55, and A/C.6/66/SR.22, para. 21), Colombia (A/C.6/66/SR.22, para. 28).

[89] Hungary (A/C.6/66/SR.24, para. 59), Poland (A/C.6/66/SR.21, para. 86).

[90] Singapore (A/C.6/66/SR.21, para. 76).

assistance upon request could be deemed unacceptable interference in a State's sovereign decision-making.[91]

54. Support was expressed for the Special Rapporteur's earlier understanding of the duty to cooperate.[92]

III. The Special Rapporteur's position on the Commission's question in chapter III.C of its 2011 annual report

55. It falls now upon the Special Rapporteur to address the Commission's question in the light of relevant State practice and the comments made by States in response to that inquiry. As a starting point, it must be recalled that draft articles 5 and 10, provisionally adopted, enshrine the duty to cooperate and the duty of affected States to seek assistance, respectively. The issue singled out by the Commission involves the interrelationship between the legal duties established in both draft articles.

56. In this respect, international practice as evidenced in international treaties shows that, although underpinned by the principles of solidarity and cooperation, the provision of assistance from one State to another upon the latter's request is premised on the voluntary character of the action of the assisting State. In this sense, article 4, paragraph 3, of the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations[93] provides that:

> "Each State Party to which a request for telecommunication assistance is directed, either directly or through the operational coordinator, shall promptly determine and notify the requesting State Party whether it will render the assistance requested, directly or otherwise, and the scope of, and terms, conditions, restrictions and cost, if any, applicable to such assistance."

57. In more explicit terms, the 2005 ASEAN Agreement on Disaster Management and Emergency Response[94] establishes in article 9, paragraph 1:

> "On a voluntary basis, each Party shall earmark assets and capacities, which may be available for the regional standby arrangements for disaster relief and emergency response, such as:
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> a. emergency response/search and rescue directory;
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> b. military and civilian assets;
>
> c. emergency stockpiles of disaster relief items; and
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> d. disaster management expertise and technologies."

58. In the above-mentioned instruments, it is made clear that the provision of assistance from one State to another must be given voluntarily and thus, no positive obligation to assist exists for the parties thereto. This practice is recognized by the

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[91] Malaysia (A/C.6/66/SR.24, para. 120).

[92] Netherlands (A/C.6/66/SR.23, para. 48).

[93] United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 48. Hereinafter the Tampere Convention.

[94] ASEAN Documents Series 2005, p. 160. Hereinafter the ASEAN Agreement.

Institut de droit international in article V of its 2003 resolution on humanitarian assistance,[95] according to which:

> "1. All States should to the maximum extent possible offer humanitarian assistance to the victims in States affected by disasters, except when such assistance would result in seriously jeopardizing their own economic, social or political conditions. Special attention should be paid to disasters affecting neighbouring States.
>
> 2. Intergovernmental organizations shall offer humanitarian assistance to the victims of disasters in accordance with their own mandates and statutory mandates."

59. In this formulation, the hortatory term "should" regarding the provision of assistance by States stands in marked contrast with the mandatory formulation "shall" used when referring to intergovernmental organizations. Such differentiation implies that, although a duty to provide assistance may exist for intergovernmental organizations when their mandates so provide, no such duty exists for States. In this respect, States remain free to decide whether or not to provide assistance, even if requested to do so by an affected State.

60. Furthermore, the statement of the Institut de droit international that States should offer humanitarian assistance "except when such assistance would result in seriously jeopardizing their own economic, social or political conditions" indicates that the limits of a State's capabilities are a pivotal criterion for the provision of humanitarian assistance. An obligation to provide assistance formulated in the abstract might represent in practice an excessive burden for those States which may not be in the position to adequately and effectively discharge their primary obligation towards their own populations, much less a duty towards those of third States. Solidarity and cooperation are of course central to the protection of persons in the event of disasters, which, as has been noted by the Special Rapporteur in his fourth report (A/CN.4/643, para. 80), is a project of the international community as a whole. However, they cannot be understood in such a way as to impair the capacity of States to comply, by virtue of their sovereignty, with their primary obligation towards their own people.

61. The limitation premised on the restricted capabilities of States finds confirmation in several international instruments. Among them the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[96] which stipulates in article 2, paragraph 4, that:

> "States Parties shall, within the limits of their capabilities, identify and notify the Agency of experts, equipment and materials which could be made available for the provision of assistance to other States Parties in the event of a nuclear accident or radiological emergency as well as the terms, especially financial, under which such assistance could be provided."

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[95] See B. Vukas (Rapporteur), "Humanitarian Assistance", Resolution, Institut de droit international, Sixteenth Commission (2003), p. 6.

[96] United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 135. Hereinafter the Nuclear Accident Convention.

62. In turn, the aforementioned ASEAN Agreement[97] embodies, in article 3, paragraph 3, the guiding principle that:

> "The Parties shall, in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situations, strengthen co-operation and co-ordination to achieve the objectives of this Agreement."

63. And further, article 11, paragraph 6,[98] provides that:

> "The Parties shall, within the limits of their capabilities, identify and notify the AHA Centre of military and civilian personnel, experts, equipment, facilities and materials which could be made available for the provision of assistance to other Parties in the event of a disaster emergency as well as the terms, especially financial, under which such assistance could be provided."

64. The limitation is also recognized by the United Nations Committee on Economic, Social and Cultural Rights, which states in paragraph 40 of its General Comment No. 14 (2000),[99] regarding the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), that:

> "States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities."

65. Similarly, the Committee, in paragraph 38 of General Comment No. 12 (1999),[100] referring to the right to adequate food (article 11 of the International Covenant on Economic, Social and Cultural Rights), stated that:

> "States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability."

66. Moreover, the same principle is also found, albeit implicitly, in the aforementioned Tampere Convention,[101] which provides in article 4, paragraph 2, that:

> "A State Party requesting telecommunication assistance shall specify the scope and type of assistance required and those measures taken pursuant to Articles 5 and 9 of this Convention, and, when practicable, provide the State Party to which the request is directed and/or the operational coordinator with any other information necessary to determine the extent to which such State Party is able to meet the request."

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[97] See footnote 94 above.
[98] Ibid., p. 161.
[99] E/C.12/2000/4.
[100] E/C.12/1999/5.
[101] See footnote 93 above.

67. In this respect, in the Sixth Committee, among the many delegations denying that a duty to provide assistance upon request by an affected State does currently exist in the realm of international law, some explicitly held that view, invoking as reasons for the denial considerations based on the limits to the national capacity of States to provide assistance.

68. In the light of the preceding considerations, the Special Rapporteur cannot but reaffirm the conclusion he had already arrived at when preparing his fourth report, that the duty to cooperate in relief matters does not currently include a legal duty for States to provide assistance when requested by an affected State. This conclusion is confirmed by the overwhelming majority of States that submitted comments in the Sixth Committee in response to the Commission's inquiry, with the delegations of Mexico,[102] Slovenia,[103] Singapore,[104] Italy,[105] Switzerland,[106] Colombia,[107] Austria,[108] Germany,[109] the United Kingdom,[110] the Netherlands,[111] Spain,[112] Hungary,[113] the Republic of Korea,[114] Malaysia[115] and Ireland[116] clearly manifesting their firm belief that no such duty exists under general international law. While other delegations — Poland,[117] Thailand,[118] Pakistan,[119] and Sri Lanka[120] — expressed views somewhat more nuanced on the subject, it must be pointed out that, in doing so, they were not admitting the existence of a duty of States to "provide" assistance upon request but were rather addressing the quite distinct issue of the possible existence of a duty to "offer" assistance.

69. The foregoing notwithstanding, it must also be noted that by means of mutual arrangements States may accept the imposition of such a duty as between the Parties thereto. Indeed, this possibility is implicitly recognized in the aforementioned article V of the 2003 resolution of the Institut de droit international on humanitarian assistance.[121] By affirming that States "should" offer assistance while intergovernmental organizations "shall" do so in accordance with their own mandates, the Institut admits that States may agree to impose on intergovernmental organizations of which they are members the positive obligation to provide assistance upon request.

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[102] A/C.6/66/SR.18, para. 55.
[103] A/C.6/66/SR.20, para. 12.
[104] A/C.6/66/SR.21, para. 76.
[105] A/C.6/66/SR.21, para. 91.
[106] A/C.6/66/SR.22, para. 21.
[107] A/C.6/66/SR.22, para. 28.
[108] A/C.6/66/SR.23, para. 23.
[109] A/C.6/66/SR.23, para. 28.
[110] A/C.6/66/SR.23, para. 45.
[111] A/C.6/66/SR.23, para. 48.
[112] A/C.6/66/SR.23, para. 50.
[113] A/C.6/66/SR.24, para. 59.
[114] A/C.6/66/SR.24, para. 82.
[115] A/C.6/66/SR.24, paras. 114 and 120-121.
[116] A/C.6/66/SR.25, para. 21.
[117] A/C.6/66/SR.21, para. 86.
[118] A/C.6/66/SR.24, para. 92.
[119] A/C.6/66/SR.25, para. 7.
[120] A/C.6/66/SR.27, para. 20.
[121] See footnote 95 above.

70. Such a possibility is also recognized in the 1986 Nuclear Accident Convention, which in article 1, paragraph 2, after formulating a general duty to cooperate to facilitate prompt assistance in the event of a nuclear accident or radiological emergency, disposes that:

> "To facilitate such cooperation States Parties may agree on bilateral or multilateral arrangements or, where appropriate, a combination of these, for preventing or minimizing injury and damage which may result in the event of a nuclear accident or radiological emergency."

71. Inter-State agreements have been concluded establishing a duty to provide assistance on request as between the Parties thereto. Among them, mention may be made of the 1991 Agreement Establishing the Caribbean Disaster Emergency Response Agency (CDERA)[122] of the Caribbean Community, article 13 of which reflects the obligation undertaken by the participating States:

> "To identify, maintain in a state of readiness and make available immediately on request by the Coordinator relevant material and human resources in the event of disaster."

72. Another example may be found in the 2008 Consolidated Version of the Treaty on the Functioning of the European Union,[123] whose article 222, paragraph 2, provides that:

> "Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council."

73. Finally, the Special Rapporteur wishes to address the issue raised in the Sixth Committee by some delegations[124] which endorsed the view that, although there is no duty to provide assistance upon request, there may exist a duty to give due consideration to requests for assistance from an affected State. There is some evidence in practice to found that position.

74. Thus, the 1986 Nuclear Accident Convention provides, in article 2, paragraph 3, that:

> "Each State Party to which a request for such assistance is directed shall promptly decide and notify the requesting State Party, directly or through the Agency, whether it is in a position to render the assistance requested, and the scope and terms of the assistance that might be rendered."

75. In the same sense, article 4, paragraph 3, the Tampere Convention provides that each party to which a request for assistance is directed "shall promptly determine and notify the requesting State Party whether it will render the assistance requested, directly or otherwise".

76. More recently, the ASEAN Agreement incorporated a similar provision, establishing in article 4, paragraph c, that in pursuing the objectives of the

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122 United Nations, *Treaty Series*, vol. 2236, No. 40212, p. 62. Hereinafter the CDERA Agreement.

123 *Official Journal of the European Union*, C 115/47.

124 Singapore (A/C.6/66/SR.21, para. 76), Mexico (A/C.6/66/SR.18, para. 55), Colombia (A/C.6/66/SR.22, para. 28), Spain (A/C.6/66/SR.23, para. 50).

Agreement, the Parties shall: "promptly respond to a request for assistance from an affected Party".

77. And further, article 11, paragraph 4, disposes that:

> "Each Party to which a request for assistance is directed shall promptly decide and notify the Requesting Party, directly or through the AHA Centre, whether it is in a position to render the assistance requested, and of the scope and terms of such assistance."

78. Pending the conclusion of the Commission's consideration of the Special Rapporteur's proposal for draft article 12, it does not appear necessary to him to indicate at the present stage a definitive position on the last issue discussed above. At any rate, the actions of an assisting State are, as much as those of an affected State, subject to the fulfilment of the principle of good faith, to which reference has been made in paragraph (9) of the Commentary to draft article 10.

IV. Elaboration on the duty to cooperate

79. In response to comments made in the Sixth Committee, as summarized above (see, in particular, paragraphs 17, 28-29, 37, 45, 47 and 53), the Special Rapporteur will proceed now to a further elaboration on the duty to cooperate, enshrined in draft article 5.

80. As discussed in the previous reports of the Special Rapporteur, cooperation plays a central role in the context of disaster relief, and is an imperative for the effective and timely response to disaster situations. Such essential role lends itself to further elaboration of the functional requirements of the duty to cooperate outlined in draft article 5 and the kind of coordination required by affected States and assisting actors.

81. The present analysis is, therefore, an attempt to identify the contours of the duty of cooperation in draft article 5. Admittedly, the nature of cooperation has to be shaped by its purpose, which in the present context is to provide disaster relief assistance. Seen from the larger perspective of public international law, to be legally and practically effective the States' duty to cooperate in the provision of disaster relief must strike a fine balance between three important aspects. First, such a duty cannot intrude into the sovereignty of the affected State. Second, the duty has to be imposed on assisting States as a legal obligation of conduct. Third, the duty has to be relevant and limited to disaster relief assistance, by encompassing the various specific elements that normally make up cooperation on this matter.

A. The nature of cooperation and respect for the affected State's sovereignty

82. By its very nature, cooperation is likely to appear in conflict with the sovereign prerogatives of the recipient State. For example, food access to domestic populations or the use of foreign search and rescue teams might both be regarded as offensive to the traditional notion of State sovereignty. The legitimate concern to give its due to the affected State's sovereignty has been examined extensively in the Special Rapporteur's previous reports and the earlier discussions in the Commission.

Therefore, while reaffirming that, as such, this issue remains a central consideration regarding the nature of cooperation, the present section needs to touch on it rather briefly.

83. Any attempt to provide disaster relief must take cognizance of the principle of sovereignty. In order to respect and safeguard the sovereignty of the affected State, article 5 disposes that cooperation will be implemented "[i]n accordance with the present draft articles". Consequently, cooperation will have to be extended in conformity with draft article 9, which places the affected State, "by virtue of its sovereignty", at the forefront of all disaster relief assistance, limiting other interested actors to a complementary role.

84. The attempt to provide for assistance while respecting the sovereignty of the affected State is not a novel concept in international law. As indicated in paragraph (1) of the commentary to draft article 5 (A/65/10, para. 331, article 5, commentary), the Charter of the United Nations balances both concepts of sovereignty (Article 2 (1)), and international cooperation (Articles 1 (3), 13, 55 and 56). Similar balancing is achieved in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[125] Likewise, such balance is reflected in General Assembly resolution 46/182 of 1991 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations and in the Tampere Convention.

B. The duty to cooperate, an obligation of conduct

85. The duty to cooperate is also embodied in article 17 of the final draft articles on the Law of Transboundary Aquifers, adopted by the Commission at its sixtieth session (A/63/10, chap. IV.E, paras. 53 and 54). Paragraph 4 of the article reads:

> "States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance."

86. The article calls for States to provide "scientific, technical, logistical and other cooperation" to other States experiencing an emergency, in order to ensure the protection of an aquifer. It expands upon the general obligation to cooperate in draft article 7 by describing the cooperation necessary between affected States and assisting actors in emergency situations. The commentary to article 17 indicates that the Commission established an obligation "of conduct and not result". The commentary further states that the "[a]ssistance required would relate to coordination of emergency actions and communication, providing trained emergency response personnel, response equipment and supplies, extending scientific and technical expertise and humanitarian assistance".

87. The ASEAN Declaration on Mutual Assistance on Natural Disasters of 1976[126] contains similar language and provides that "the Member Countries shall, within

[125] General Assembly resolution 2625 (XXV) (1970).

[126] Available from www.aseansec.org. Hereinafter the 1976 ASEAN Declaration.

their respective capabilities, cooperate in the improvement of communication channels among themselves as regards disaster warnings, exchange of experts and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance".

88. The establishment of an obligation of conduct rather than one of result appears in various United Nations instruments. The General Assembly, in paragraph 12 of the annex to resolution 46/182 of 1991, called for the United Nations to adopt a coordinating role in the provision of emergency aid, but not for specific attainments as a result of that coordination. The Declaration on the Establishment of a New International Economic Order (1974) focuses on conduct in its call for "[t]he strengthening, through individual and collective actions, of mutual economic, trade, financial and technical cooperation among the developing countries."[127]

89. The Economic and Social Council, in resolution 2008/36 of 25 July 2008 dealing with emergency humanitarian assistance, also called for specific conduct without envisaging any specific outcome, when it:

> "*Encourages* Member States to create and strengthen an enabling environment for the capacity-building of their national and local authorities, national societies of the Red Cross and Red Crescent, and national and local non-governmental and community-based organizations in providing timely humanitarian assistance, and also encourages the international community, the relevant entities of the United Nations system and other relevant institutions and organizations to support national authorities in their capacity-building programmes, including through technical cooperation and long-term partnerships based on recognition of their important role in providing humanitarian assistance".[128]

90. Several multilateral conventions prioritize the establishment of an obligation of conduct. The States parties to the Tampere Convention, for example, agree, in article 2 (c), to "the provision of prompt telecommunication assistance to mitigate the impact of a disaster", but not to the functioning of a given type of telecommunications network. For its part, the ASEAN Agreement, which has detailed provisions on the methods of technical and scientific cooperation, does not turn any of those provisions into obligations. Instead of, for example, agreeing to standardize their reporting methods by a certain date, the members of ASEAN agree, in article 18.1 b of the ASEAN Agreement, to "promote the standardization of the reporting format of data and information". Similarly, obligations of conduct and not result are found in the 2006 Convention on the Rights of Persons with Disabilities[129] and the 1986 Nuclear Accident Convention.

91. Outside the realm of international disaster relief law proper, the obligation to cooperate as an obligation of conduct and not one of result is also embodied in bilateral treaties. Among the many examples, suffice it to mention the United States-Mexico Treaty on Agriculture, which commits both States to cooperation on

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[127] General Assembly resolution 3201 (S-VI), para. 4 (s).

[128] Economic and Social Council resolution 2008/36, entitled "Strengthening of the coordination of emergency humanitarian assistance of the United Nations", para. 2.

[129] United Nations, *Treaty Series*, vol. 2515, No. 44910.

fumigation of pears, and not to the eradication of the Oriental Moth.[130] The European Union-United States Agreement on Controlled Substances calls for "technical cooperation ... in particular, training and exchange programmes for the officials concerned", but not in requiring that those officials pass a certain predetermined knowledge test.[131]

92. In line with other relevant international legal obligations, by its very nature, cooperation regarding the protection of persons in the event of disasters implies an obligation of conduct and not one of result.

C. Categories of cooperation

93. In the context of the present topic, the duty to cooperate has a well-defined goal, i.e., to protect persons in the event of disasters. To meet this goal in practice, the duty to cooperate most often covers activities such as "medical care, food, agricultural training, disaster relief, shelter, education, clothing, water, professional exchanges, institutional reform, technical assistance, and support of human rights and civil liberties".[132] The duty to cooperate must be understood as encompassing a great variety of coordinating, technical, scientific and logistical activities. Guidance as to the extent of such activities under draft article 5 can be found in other related international legal rules that specify the nature of the cooperation involved.

94. Cooperation has been addressed in specific terms in various United Nations instruments. The General Assembly, in paragraph 27 of the annex to resolution 46/182, explained how the United Nations should adopt a coordinating role and — as an indicative list — should "establish a central register of all specialized personnel and teams of technical specialists, as well as relief supplies, equipment and services available within the United Nations system and from Governments and intergovernmental and non-governmental organizations, that can be called upon at short notice by the United Nations". The Declaration on the Establishment of a New International Economic Order calls, in turn, for, inter alia, the strengthening of "technical cooperation". Such cooperation was also called for by the Economic and Social Council in resolution 2008/36, which focused on humanitarian assistance. The last two instruments, however, do not elaborate on the meaning of "technical cooperation".

95. Some multilateral conventions refer to specific categories of cooperation without accompanying them by indicative or exhaustive lists. For example, the International Covenant on Economic, Social and Cultural Rights refers to economic and technical cooperation (article 2) and to the creation of specific programmes on

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[130] State Department No. 02-50, 2002 WL 1517444 (Treaty), Memorandum of understanding between the United States Department of Agriculture and the Office of the United States Trade Representative, and the Secretariat of Agriculture, Livestock, Rural Development, Fisheries and Food and the Secretariat of Economy of the United Mexican States regarding areas of food and agricultural trade (2002).

[131] State Department No. 97-119, 1997 WL 529522 (Treaty), Agreement between the United States of America and the European Community on Precursors and Chemical Substances Frequently Used in the Illicit Manufacture of Narcotic Drugs or Psychotropic Substances (2007).

[132] Christine Holland Anthony, "The Responsible Role for the International Charitable Grantmaking in the Wake of the September 11, 2001 Terrorist Attacks", *Vanderbilt Journal of Transnational Law*, Vol. 9 (2006), p. 911.

the problem of hunger (article 11).[133] A series of environmental conventions also call for coordination on the basis of such general categories. The Stockholm Declaration on the Human Environment (1972) provides for "accelerated development through financial and technological assistance", which "includes scientific information and expertise relevant to mitigating environmental degradation".[134] The Vienna Convention for the Protection of the Ozone Layer calls for information-sharing among all State parties of scientific, technical, socioeconomic, commercial and legal information relevant to that Convention.[135] Finally, the Montreal Protocol appeals to developed nations to provide financial assistance and technology to less-developed nations.[136]

96. Other multilateral treaties provide more detailed examples which help to clarify the general categories of cooperation which they identify. The 2006 Convention on the Rights of Persons with Disabilities indicates, in article 32 (d), that "technical and economic assistance" includes "facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies".[137] Similarly, the Tampere Convention, in article 3, paragraph 2 (c), calls for "the provision of prompt telecommunication assistance to mitigate the impact of a disaster", to be accomplished by means such as "the installation and operation of reliable, flexible telecommunication resources to be used by humanitarian relief and assistance organizations" (article 3, paragraph 2 (d)).

97. In an even more detailed fashion, article 18 of the ASEAN Agreement holds that:

> "Technical Co-operation
>
> "1. In order to increase preparedness and to mitigate disasters, the Parties shall undertake technical co-operation, including the following:
>
> a. facilitate mobilisation of appropriate resources both within and outside the Parties;
>
> b. promote the standardisation of the reporting format of data and information;
>
> c. promote the exchange of relevant information, expertise, technology, techniques and know-how;
>
> d. provide or make arrangements for relevant training, public awareness and education, in particular, relating to disaster prevention and mitigation;
>
> e. develop and undertake training programmes for policy makers, disaster managers and disaster responders at local, national and regional levels; and
>
> f. strengthen and enhance the technical capacity of the Parties to implement this Agreement.

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[133] United Nations, *Treaty Series*, vol. 993, No. 14531, articles 2 and 11, respectively.

[134] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (A/CONF.48/14/Rev.1), part one.

[135] Vienna Convention for the Protection of the Ozone Layer (1985), art. 4.1.

[136] Montreal Protocol on Substances that Deplete the Ozone Layer (1987), art. 8.

[137] See footnote 129 above.

2. The AHA Centre shall facilitate activities for technical co-operation as identified in paragraph 1 above."

98. The 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides general headings for the type of cooperation it envisages and a detailed list of actions under each heading. For example, it allows the International Atomic Energy Agency (IAEA) to:

"assist a State Party or a Member State when requested in any of the following or other appropriate matters:

- preparing both emergency plans in the case of nuclear accidents and radiological emergencies and the appropriate legislation;
- developing appropriate training programmes for personnel to deal with nuclear accidents and radiological emergencies;
- transmitting requests for assistance and relevant information in the event of a nuclear accident or radiological emergency;
- developing appropriate radiation monitoring programmes, procedures and standards;
- conducting investigations into the feasibility of establishing appropriate radiation monitoring systems;".

While not exhaustive, the foregoing list gives a clear indication of many forms of cooperation allowing, by analogy, an evaluation of other possible forms.

99. In other fields, most bilateral agreements that call for some form of technical cooperation provide a list with the types of assistance that such cooperation encompasses. For example, the International Tribunal for the Former Yugoslavia concluded agreements with domestic jurisdictions to provide technical assistance and evidence for domestic trials. Those agreements mentioned the type of technical assistance involved. Additionally, the United States-Mexico Agreement on Agriculture enumerated specific types of activities such as fumigation,[138] while the United States-South Korea Agreement on Science and Technology explained that cooperation included "research, exchanges of scientific information, scientific visits, individual exchanges, joint seminars and workshops, and other forms of activities as are mutually agreed upon".[139]

100. As indicated in the preceding paragraphs, instruments in the field of disaster response refer, broadly speaking, to scientific, technical and logistical cooperation. That includes the coordination of communication and sharing of information, the provision of personnel, response equipment and supplies, and the extension of scientific and technical expertise to strengthen the response capacity of the affected State. Owing to the nature of many of the requirements of disaster relief efforts, regulatory barriers to the entry of personnel and equipment and supplies pose a particular challenge, and are thus treated by a variety of international, regional and bilateral agreements. Additionally, a significant number of more recent agreements have focused on ex ante cooperation emphasizing disaster prevention and preparedness, including search and rescue arrangements, standby capacity

[138] United States-Mexico Treaty (see footnote 130 above).

[139] State Dept. No. 00-115, 2000 WL 1706748 (Treaty), United States of America-Korea, Memorandum of Understanding Concerning Cooperation in Science and Technology (2000).

requirements, early warning systems, exchange of information pertaining to risk identification, and contingency planning.

1. Communication and exchange of information

101. One aspect of cooperation that is frequently mentioned in disaster relief instruments is communication. The coordination of communication and exchange of information is essential to effective disaster response. Accordingly, many of the instruments that deal with disaster relief also touch upon the topic of information exchange.[140] For example, the preamble of the Tampere Convention notes "the vital role of broadcasting in disseminating accurate disaster information to at-risk populations",[141] and the Framework Convention of Civil Defence Assistance of 2000 requires the affected State to "provide all necessary information available relating to the situation, so as to ensure smooth implementation of assistance".[142] The Hyogo Framework for Action 2005-2015 also emphasizes the central role of information exchange, dialogue and cooperation in the context of disasters.[143]

102. The approach taken by various instruments with regard to communications varies, as some provisions refer generally to the desirability of effective disaster relief communications or a general obligation of the affected State to facilitate communications, while others contain more specific direction pertaining to the facilitation of disaster relief communications. For example, the International Law Association's model bilateral agreement provides that "in the zone of operations ... the organization shall have the right to communicate by radio, telegraph, or by any other means and to establish the necessary means for the maintenance of said communications in the interior of its facilities or between these facilities and its service units".[144] Likewise, the Guidelines on the Use of Military and Civil Defence Assets in Disaster Relief (Oslo Guidelines) state that "the Affected State should provide to the international disaster community timely and accurate information on

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[140] See, e.g., Agreement between Denmark, Finland, Norway and Sweden on Cooperation Across State Frontiers to Prevent or Limit Damage to Persons or Property or to the Environment in the Case of Accidents, 1989, art. 6 (1). ("The Contracting States shall provide each other with information of importance for this agreement".) See also Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, 1998, art. 4 (4). Hereinafter BSEC Agreement.

[141] Tampere Convention, also available from www.reliefweb.int/telecoms/tampere/index.html. See article 3, which calls for "the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards, health hazards and disasters", and "the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities".

[142] Framework Convention on Civil Defence Assistance, 22 May 2000, art. 4 (a) (1), 2172, United Nations, *Treaty Series*, vol. 2172, No. 38131. Hereinafter the Framework Convention.

[143] Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

[144] Draft Model Agreement on International Medical and Humanitarian Law, art. 6. See also the Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies, 2001, art. 8 (2) ("the competent authorities of the requesting State shall undertake ... to facilitate the use by the aid units of existing telecommunication systems or the use of special frequencies, or both, or the establishment by the aid units of an emergency telecommunications system").

the nature and magnitude of the disaster, in order to enhance the effectiveness of external assistance".[145]

103. In the vein of substantive measures to facilitate communications, the CDERA Agreement provides, in article 11 (c), for the creation and maintenance of an emergency operations system to handle emergency telecommunications. The most comprehensive instrument in this area is the Tampere Convention, which provides a regulatory framework for cooperation with respect to the utilization of telecommunications and information technology in disasters.

2. Scientific and technical assistance

104. Another oft-mentioned modality of cooperation is the provision of scientific, technical or technological assistance and expertise. Different classes of disasters may call for specific technologies or expertise that are either not readily available in the affected country or that are not available in sufficient degree or quantity. Consequently, a number of instruments refer specifically to the provision of scientific and technical assistance, such as the ASEAN Agreement, which, in article 18 entitled "Technical Co-operation", calls for Parties to "promote the exchange of relevant information, expertise, technology, techniques and know-how".[146] The Framework Convention also refers, in article 2 (a), to cooperation with regard to the exchange of expertise. Moreover, a number of bilateral agreements provide for mutual assistance in scientific and technical matters as well.[147]

105. Technology can also enhance communication, as the utilization of telecommunications and information technology can substantially improve information exchange and increase the overall efficacy and efficiency of disaster relief efforts. The Tampere Convention deals with the provision of telecommunications assistance, including equipment, materials, information, training, radio-frequency spectrum, network or transmission capacity or other resources necessary to telecommunications. Another agreement that refers to a specific class of technological cooperation is the Charter on Cooperation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters (also known as the International Charter on Space and Major Disasters), which relates to coordination of satellite technology in the disaster relief context.[148]

3. Relief personnel

106. Effective disaster relief also necessitates coordination with regard to the provision of emergency response personnel to strengthen the response capacity of the affected State, including medical teams, search and rescue teams, and technical

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[145] Oslo Guidelines, as revised on 27 November 2006, para. 54; available from www.ifrc.org/idrl. Hereinafter Oslo Guidelines.

[146] Art. 18 (c). See paragraph 97 above. Also available from www.aseansec.org.

[147] See, for example, the Convention between the Kingdom of the Netherlands and the Kingdom of Belgium on Mutual Assistance in Combating Disasters and Accidents (1984), art. 13 (stating that the Parties should exchange all useful information of a scientific and technical nature), available from www.ifrc.org/docs/idrl/I94EN.pdf; see also the Protocol between the Kingdom of Spain and the Portuguese Republic on Technical Cooperation and Mutual Assistance in the Field of Civil Defense, 1992, art. 1 (2), and the Agreement between the Kingdom of Spain and the Argentine Republic on Cooperation on Disaster Preparedness and Prevention, and Mutual Assistance in the Event of Disasters (1988), art. IV.

[148] Available from www.disasterscharter.org.

specialists. A number of instruments call upon States to coordinate efforts and facilitate the expedited entry of relief personnel. These include General Assembly resolutions 46/182 of 1991[149] and 57/150 of 2002,[150] as well as the Measures to Expedite International Relief adopted by the International Conference of the Red Cross and Red Crescent Societies and the Economic and Social Council in 1977 and endorsed in by the General Assembly in resolution 32/56.[151]

107. In addition to the entry of personnel, instruments also deal with the coordination, facilitation and supervision of the provision of assistance within the affected State. Common issues are freedom of movement, transport of personnel, access to facilities, and coordination with the affected State, including the provision of support, relevant information, guidance, and translation and interpretation services. The General Assembly, in resolution 46/182, referred broadly to "facilitating" the work of relief teams. The Tampere Convention provides, in article 9, that "the States Parties shall, when possible, and in conformity with their national law, reduce or remove ... regulations restricting the movement of personnel who operate telecommunication equipment or who are essential to its effective use", and the Oslo Guidelines call, in paragraph 60, for "free access to disaster zones" for relief teams. The CDERA Agreement provides, in articles 16 and 22, for the cooperation of the affected State in making available local facilities and services and facilitating the in-country transit of relief personnel.

108. A number of instruments, including the Framework Convention, the Tampere Convention, the Inter-American Convention, and the Oslo Guidelines deal with the identification and protection of relief personnel.[152] The General Assembly, in paragraph 4 of its resolution 57/150, urged "all States to undertake measures to ensure the safety and security of international urban search and rescue teams operating in their territory".

4. Relief supplies and equipment

109. Disaster relief efforts also require a variety of goods and equipment. Victims of the disaster need food, clothing, medicine and other items to support their basic needs. Relief teams require equipment such as telephones, radios, computers, vehicles and construction equipment in order to operate effectively. While some goods and equipment necessary in the aftermath of a disaster may be found locally, there may be a need for the importation of items in the event of a shortage of goods and equipment in the affected State. Owing to the nature of disasters, the rapid attainment of relief supplies is critical. Moreover, many of those items — such as food and medicine — could spoil or expire if not transported and delivered in a timely manner. Cooperation in the area of provision and facilitation of entry of relief supplies and equipment is particularly crucial because many of the necessary items are highly regulated by domestic law. Those items include foods, medicines, machines, telecommunications equipment, vehicles and rescue dogs.

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[149] General Assembly resolution 46/182, annex, paras. 27 and 28.

[150] General Assembly resolution 57/150, para. 3.

[151] See also the Inter-American Convention to Facilitate Disaster Assistance, 7 June 1991, art. VII, available from www.oas.org/juridico/english/treaties/a-54.html; hereinafter the Inter-American Convention; League of Arab States Decision No. 39 (Arab Cooperation Agreement on Regulating and Facilitating Relief Operations), art. 3, English translation available from www.ifrc.org/Docs/idrl/I644EN.pdf.

[152] See Tampere Convention, art. 5 (3); Inter-American Convention, arts. VII and XI.

110. As such, many agreements and guidelines deal with the facilitation of rapid access to disaster relief equipment and supplies. Some instruments specify those items and treat them in detail, while others make general provisions for "relief supplies and equipment", which encompass a variety of items. The General Assembly, in resolution 46/182, called generally for coordination to facilitate expeditious access to relief supplies, and suggested, in paragraph 30 of the annex to that resolution, that "disaster-prone countries should develop special emergency procedures to expedite the rapid procurement and deployment of equipment and relief supplies". The Measures to Expedite International Relief[153] also focus on coordination to avoid delay because of regulatory barriers.

111. Some instruments highlight equipment and supplies with specificity. The ASEAN Agreement, for example, mentions, in article 14 (a), telecommunications equipment and vehicles specifically. General Assembly resolution 46/182 and the International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention"), adopted in 1973 and amended in 1999, call on affected States to assist in the entry of medicines.[154] The Kyoto Convention also expressly refers to "specially trained animals" among the types of relief consignments that should be prioritized for expedited processing. Several bilateral agreements, such as the Agreement between Sweden and Norway concerning the Improvement of Rescue Services in Frontier Areas of 1974 and the Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies of 2001, also deal with the entry process for specially trained rescue dogs.

112. Agreements also provide for the re-export of goods to ensure that relief supplies and equipment can be efficiently redirected to where they are most needed. The ASEAN Agreement calls, in article 14 (b), for the facilitation of "the entry into, stay in, *and departure from* its territory of personnel and of equipment, facilities, and materials involved or used in the assistance" [emphasis added]. Similarly, the Tampere Convention, in article 9, calls for reduction of "regulations restricting the transit of telecommunication resources into, out of, and through the territory of a State party".

113. Cooperation involves both accommodation by the affected State to expedite and facilitate the provision of relief assistance and coordination and planning by assisting actors to reduce the complications of providing relief. If assisting actors are informed of and prepare adequately for the requirements of the affected State, the process can be made more efficient. The Measures to Expedite International Relief call on "donors to restrict their relief contributions to those high-priority relief needs identified by appropriate relief authorities and agencies". Many instruments provide for a degree of specificity to the requests of affected States, and for assisting actors to comply with those requests. The Inter-American Convention, for example, states in article II (b) that "upon the occurrence of a disaster the

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153 Resolution 6 adopted at the 23rd International Conference of the Red Cross and Red Crescent, in *Handbook of the International Red Cross and Red Crescent Movement* (third edition, 1994), pp. 811-815, recommendation D.

154 International Convention on the Simplification and Harmonization of Customs Procedures (hereinafter "Kyoto Convention"), of 18 May 1973, United Nations, *Treaty Series*, vol. 950, No. 13561, p. 269, as amended by the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures, of 26 June 1999, United Nations, *Treaty Series*, vol. 2370, No. 13561, p. 27.

assisting State shall consult with the assisted State to receive from the latter information on the kind of assistance considered most appropriate to provide to the populations stricken by the disaster". Communication as to the requirements, capacities and expectations of concerned parties can facilitate the relief process significantly and reduce the difficulty caused by regulation.

5. Cooperation in disaster preparedness, prevention and mitigation

114. More recent conventions have shifted the focus from a primarily response-centric model to one focused largely on prevention and preparedness. Many instruments deal with not only cooperation as it pertains to relief assistance, but also the prevention and mitigation of disasters: search and rescue arrangements, standby capacity requirements, early warning systems, exchange of information pertaining to risk assessment and identification, contingency planning and capacity-building.

115. The Hyogo Framework for Action puts a large degree of emphasis on prevention and preparedness, stating that one of the agreement's primary objectives is "to share good practices and lessons learned to further disaster reduction within the context of attaining sustainable development, and to identify gaps and challenges".[155] The General Assembly, in paragraphs 5, 13 and 14 of the annex to resolution 46/182, called for cooperation in sharing scientific and technical information related to the assessment, prevention, mitigation and early warning of disasters as well as assistance to developing States to bolster their capacity in disaster prevention and mitigation, while in paragraph 7 of resolution 57/150 the Assembly more generally encouraged "the strengthening of cooperation among States at the regional and subregional levels in the field of disaster preparedness and response, with particular respect to capacity-building at all levels".[156] Other instruments call for cooperation in regard to the training of experts, research, and studies to increase preparedness, such as the ASEAN Agreement, which states in article 19 that "the Parties shall individually or jointly, including in cooperation with appropriate international organizations, promote and, whenever possible, support scientific and technical research programmes related to the causes and consequences of disasters and the means, methods, techniques and equipment for disaster risk reduction".

116. In the light of all of the above, the Special Rapporteur concludes that the inclusion is warranted in the set of draft articles on Protection of Persons in the Event of Disasters of an additional draft article concerning the elaboration of the Duty to Cooperate. That additional draft article, whose number and placing in the set is to be decided at a later stage, can most economically and usefully be modelled on article 17, paragraph 4, of the draft articles on the Law of Transboundary Aquifers, quoted earlier (see para. 85 above). The proposed additional draft article would thus read as follows:

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[155] *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters* (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

[156] See also the Southern African Development Community Protocol on Health, art. 25 (b) (calling for Parties to "collaborate and facilitate regional efforts in developing awareness, risk reduction, preparedness and management plans for natural and man-made disasters"), 1999, available from www.sadc.int.

Draft article A
Elaboration of the duty to cooperate

States and other actors mentioned in draft article 5 shall provide to an affected State scientific, technical, logistical and other cooperation, as appropriate. Cooperation may include coordination of international relief actions and communications, making available relief personnel, relief equipment and supplies, scientific and technical expertise and humanitarian assistance.

V. Conditions for the provision of assistance

117. The Commission has established in draft article 9 that an affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and to ensure the provision of humanitarian assistance on its territory. It also has the primary role to direct, control, coordinate and supervise such assistance within its territory. The Special Rapporteur will now consider the conditions that an affected State may place on the provision of assistance.

118. In determining the extent of appropriate conditions, it is necessary to reiterate the core principles of State sovereignty and non-intervention. The Special Rapporteur, in his third report (A/CN.4/629, para. 75), noted that "[t]he correlating principles of sovereignty and non-intervention presuppose a given domestic sphere, or a *domaine réservé*, over which a State may exercise its exclusive authority". In formulating his proposal for draft article 9, the Special Rapporteur took particular note of the principles of State sovereignty and non-intervention, concluding that "it is clear that a State affected by a disaster has the freedom to adopt whatever measures it sees fit to ensure the protection of the persons found within its territory" (ibid., para. 74). As such, the affected State may impose conditions on the provision of assistance, including compliance with its national laws and fulfilling demonstrated needs.

119. The core principles of State sovereignty and non-intervention should be considered in the light of the responsibilities undertaken by States, in the exercise of their sovereignty, to other States and to individuals within a State's territory and control. As recognized in the Judgment in the *Corfu Channel* case, "[s]overeignty confers rights upon States and imposes obligations on them".[157] According to the commentary, draft article 9 reflects those obligations and "affirms the primary role held by an affected State in the response to a disaster upon its territory".[157] Therefore, any condition imposed by the affected State must be reasonable and must not undermine the duty to ensure protection of persons on its territory. Furthermore, the affected State has a corresponding duty to facilitate the prompt and effective delivery of assistance, which includes the waiver of national laws as appropriate.

A. Compliance with national laws

120. An affected State may condition the provision of assistance on compliance with its national law. A requirement of compliance with national law follows

[157] *Corfu Channel* case (*United Kingdom of Great Britain and Northern Ireland v. Albania*), *Judgment* of 9 April 1949, *I.C.J. Reports 1949*; Separate Opinion by Judge Álvarez, p. 43. See A/66/10, para. 289, commentary to art. 9, para. (2).

naturally from the principles stated in draft article 9, by virtue of its sovereignty: the duty to ensure the protection of persons and to ensure the provision of humanitarian assistance lies with the affected State, and it has the primary role in the direction, control, coordination and supervision of such assistance. Moreover, this principle is grounded in State practice.

121. There are several multilateral treaties which include a provision requiring compliance with national law. The Tampere Convention states, in article 4 (8): "Nothing in this Convention shall interfere with the right of a State Party, *under its national law*, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory" (emphasis added).

122. The ASEAN Agreement provides (art. 13 (2)) that "[m]embers of the assistance operation shall respect and abide by all national laws and regulations". Several other international agreements also require assisting actors to respect national laws[158] or to act in accordance with the law of the affected State.[159]

123. The General Assembly also declared, in paragraph 5 of the annex to resolution 46/182, that "cooperation [to address emergency situations] should be provided in accordance with international law *and national laws*" (emphasis added). This is a clear statement that the affected State should be able to condition the provision of assistance on compliance with its national law.

124. Several non-binding and draft provisions on disaster assistance include a requirement that assisting actors respect, abide by or observe the affected State's national law.[160] Those international law instruments acknowledge the principle that assisting actors should comply with an affected State's national law.

125. Conditioning the provision of assistance on compliance with national law creates obligations on the assisting actors. Furthermore, as an exception to the rule that the State may condition the provision of assistance on compliance with national law, the affected State must facilitate prompt and effective assistance.

1. Obligation of assisting actors to cooperate in compliance with national laws

126. In deference to the right of the affected State to condition the provision of assistance on compliance with national law, there is a corresponding obligation on assisting actors to provide assistance in compliance with the national law and

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158 See, for example, the Inter-American Convention, art. VIII, XI (d); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, art. 8 (7).

159 Ibid.; Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-made Disasters, of 15 April 1998, arts. 5 and 9, hereinafter BSEC Agreement.

160 See, for example, International Federation of the Red Cross, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, November 2007, adopted at the 30th International Conference of the Red Cross and Red Crescent, Geneva, document 30IC/07/R4, annex, art. 4 (1), hereinafter IFRC Guidelines; Peter MacAlister-Smith, Draft International Guidelines for Humanitarian Assistance Operations (Heidelberg, Germany: Max Planck Institute for Comparative Public Law and International Law, 1991), arts. 9 (b) and 22 (d), hereinafter Max Planck Guidelines; and Council of Europe, recommendation Rec(2002)3, of the Committee of Ministers to member States on transfrontier cooperation in civil protection and mutual assistance in the event of natural and technological disasters occurring in frontier areas, adopted by the Committee of Ministers at the 786th meeting of the Ministers' Deputies, 6 March 2002, appendix, para. 9.

authorities of the affected State. The obligation to respect the national law and authorities of the affected State arise out of respect for the sovereignty of the affected State and the principle of cooperation, reaffirmed in draft article 5.

127. Three obligations on assisting actors flow from the general principle that assistance be provided in compliance with the national laws and authorities of the affected State. First, there is an obligation on members of the relief operation to observe the national laws and standards of the affected State. Second, there is an obligation of the head of the relief operation to ensure the observance of the national laws and standards of the affected State. Finally, there is the obligation to cooperate with national authorities.[161]

128. First, there is an obligation on personnel of the relief operation to observe the national laws and standards of the affected State. An articulation of this general principle is found in the Convention on the Transboundary Effects of Industrial Accidents: "The personnel involved in the assisting operation shall act in accordance with the relevant laws of the requesting Party."[162] The Inter-American Convention states, in article XI (d), that "[a]ssistance personnel have the obligation to respect the laws and regulations of the assisted State and of States they may cross en route. Assistance personnel shall abstain from political or other activities that are inconsistent with said laws or with the terms of this Convention". Similarly, the BSEC Agreement states: "[t]he members of the assistance team are obliged to observe the State laws and rules of the Requesting Party".[163]

129. Second, the head of the relief operation of the assisting State, international organization or other humanitarian actor has a duty to ensure the observance of the national laws and standards of the affected State. This duty was articulated in article 13 (2) of the ASEAN Agreement: "The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations". This obligation flows naturally from the general understanding that the head of the relief operation is generally responsible for the "immediate operational supervision of the personnel".[164]

130. Third, in order to comply with national laws and pursuant to obligations to cooperate under draft article 5, the assisting State has an obligation to cooperate with national authorities. The Max Planck Guidelines provide, in paragraph 22 (b), that "[a]t all times during humanitarian assistance operations the assisting personnel shall ... [c]ooperate with the designated competent authority of the receiving State". Similarly, the IFRC Guidelines state, in article 4 (1), that "assisting actors and their personnel should ... coordinate with domestic authorities". The United Nations Institute for Training and Research (UNITAR) Model Rules for Disaster Relief Operations (1982) have elaborated on the purpose of such an obligation: "Relief

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[161] See ASEAN Agreement, art. 13 (2) ("Members of the assistance operation shall respect and abide by all national law and regulations. The Head of the assistance operation shall take all appropriate measures to ensure observance of national laws and regulations. The receiving Party shall cooperate to ensure that members of the assistance operation observe national laws and regulations.").

[162] Convention on the Transboundary Effects of Industrial Accidents, of 17 March 1992, United Nations, *Treaty Series*, vol. 2105, No. 36605, annex X (1).

[163] BSEC Agreement, art. 9 (3). See also IFRC Guidelines, art. 4 (1); and Max Planck Guidelines, para. 22 (d).

[164] Transboundary Effects Convention, annex X (1).

personnel shall cooperate at all times with the appropriate authorities of the receiving State to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the facilities granted".[165]

2. Exception for the affected State to facilitate prompt and effective assistance

131. As articulated in draft article 9, the affected State has the duty to ensure the protection of persons on its territory. As such, the right to condition the provision of assistance on compliance with national law is not absolute. The exception to this rule is that the affected State has a duty to facilitate the provision of prompt and effective assistance, under its sovereign obligations to its population. States have an obligation to assist in compliance with national law and an obligation to examine whether certain national laws must be waived in the event of a disaster.

132. First, States have an obligation to assist in compliance with national law. The obligation to ensure prompt and effective assistance includes an obligation to provide relevant information to assisting actors. Article 3 (1) of the BSEC Agreement provides that "[t]he Parties shall cooperate ... in order to provide prompt relevant information and assistance in case of natural or man-made disasters".[166] This duty extends to an obligation of the affected State to cooperate to ensure the observance of national law, as illustrated by article 13 (2) of the ASEAN Agreement: "[t]he receiving Party shall cooperate to ensure the members of the assistance operation observe national laws and regulations".[167]

133. As part of the duty to cooperate to ensure the observance of national law, the affected State has an obligation to provide assisting actors with relevant laws, including those relating to privileges and immunities and regulatory barriers. This obligation extends only to laws that are relevant in the disaster context. As stated in article 10 (3) of the IFRC Guidelines, "[a]ffected States should make available to assisting actors adequate information about domestic laws and regulations of particular relevance to the entry and operation of disaster relief or initial recovery assistance".

134. Second, in certain circumstances, an affected State may be required to waive provisions of its law in order to facilitate the prompt and effective provision of assistance in order to fulfil its duty to ensure the protection of persons on its territory. As noted in the Memorandum by the Secretariat (A/CN.4/590, para. 70), "national laws are, generally speaking, not well suited for the purpose of creating a 'humanitarian space' in the wake of a disaster since compliance can prove onerous and costly in terms of both resources and time lost". A waiver of national law by the affected State of its national laws should promote access to and the timeliness of the delivery of assistance (ibid., paras. 105 and 106).

135. International instruments currently recognize several instances when national laws must be waived in order to facilitate prompt and effective assistance: privileges and immunities, visa and entry requirements, customs requirements and tariffs, and

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[165] United Nations Institute for Training and Research, Policy and Efficacy Studies No. 8 (Sales No. E.82.XV.PE/8), annex A, rule 14. Hereinafter UNITAR Model Rules. See also Oslo Guidelines, version of 27 November 2006, para. 48.

[166] See also Max Planck Guidelines, art. 19 (c).

[167] See footnote 161 above.

quality and freedom of movement. Waiver of national law in each of these fields should not be required in every circumstance, but rather should be reasonable when balancing the affected State's duty to provide assistance and its obligation to protect its population from harm in the light of the particular circumstances.

136. The first instance when national laws must be amended or waived concerns the privileges and immunities of actors participating in disaster relief operations. The 1986 Nuclear Accident Convention requires (art. 8 (2) (a)) an affected State requesting assistance to provide certain privileges and immunities to assisting actors, including immunity from arrest, detention and legal process. An agreement between Austria and the Federal Republic of Germany also requires the affected State to extend "protection" to the emergency teams of assisting States.[168] The Framework Convention on Civil Defence Assistance also states, in article 4 (5): "The Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance".

137. The second instance when national laws must be amended or waived concerns visa and entry requirements. The League of Red Cross Societies has long noted that entry requirements and visas serve as a "time-consuming procedure which often delays the dispatch of such delegates and teams",[169] thus delaying the vital assistance the affected State has a duty to provide. The ASEAN Agreement, in article 14 (b), requires an affected State to "facilitate the entry into, stay in and departure from its territory of personnel and of equipment, facilities and materials involved or used in the assistance". The Nuclear Accident Convention includes a similar provision (art. 8 (5)). Specific bilateral agreements have also allowed entry to assisting actors without obtaining entry permits in the event of a disaster.[170] In addition to those waivers of entry requirements, the Tampere Convention, in articles 9 (1) and 9 (3) (d), also requires affected States to remove regulatory barriers, including recognizing foreign operating licences in the field of telecommunications. There are also numerous international agreements requiring

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[168] Agreement between the Republic of Austria and the Federal Republic of Germany concerning mutual assistance in the event of disasters or serious accidents, of 23 December 1988, United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 9 (3).

[169] Resolution adopted by the League of Red Cross Societies Board of Governors at its 33rd session, Geneva, 28 October-1 November 1975.

[170] See, for example, the Convention on Mutual Assistance in Fighting Catastrophes and Accidents, Belgium-Netherlands, of 14 November 1984, United Nations, *Treaty Series*, vol. 1526, No. 26466, art. 6 (2) and (3). See also the Agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa regarding the Coordination of Search and Rescue Services, of 10 May 2002, art. 2 (2); Agreement between the Republic of Austria and the Federal Republic of Germany concerning Mutual Assistance in the Event of Disasters or Serious Accidents, of 23 December 1988, United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 6; Convention on Mutual Assistance in the Event of Disasters or Serious Accidents, of 3 February 1977, France-Germany, United Nations, *Treaty Series*, vol. 1214, No. 19561, art. 4; Agreement on Cooperation and Mutual Assistance in Cases of Accidents, of 26 June 1995, Estonia-Finland, United Nations, *Treaty Series*, vol. 1949, No. 33393, art. 9; Agreement between the Government of the Republic of South Africa and the Government of the Republic of Namibia regarding the Coordination of Search and Rescue Services, of 8 September 2000, art. 7; Agreement on Cooperation for Natural Disasters Prevention and Rehabilitation, of 10 April 1987, Guatemala-Mexico, United Nations, *Treaty Series*, vol. 1509, No. 26055, art. V.

unencumbered passage through transit States regardless of entry or visa requirements.[171]

138. Some agreements, such as the Inter-American Convention, the Tampere Convention and the ASEAN Agreement, do not require a waiver of entry and visa requirements, but simply require States to use their existing national laws to allow entry.[172] However, the better requirement may be to recognize that a waiver is required in order to promote the prompt and effective provision of assistance in the event of a natural disaster because of the concerns noted by the League of Red Cross Societies.

139. The third instance in which national law may be amended or waived concerns an affected State's, and even transit States', customs requirements and tariffs on assistance in the event of a natural disaster. That requirement reduces costs and delays with respect to transit States in the event of a natural disaster, promoting prompt and effective assistance.[173] Some international instruments require facilitation of entry of goods and equipment relating to disaster relief. Other instruments additionally require that such goods and equipment not be taxed.

140. With respect to facilitating the clearance of customs, Specific Annex J, Chapter 5, article 2 of the Kyoto Convention requires that "clearance of relief consignments for export, transit, temporary admission and import be carried out as a matter of priority".[174] The Tampere Convention and the ASEAN Agreement contain similar provisions.[175] In addition, bilateral treaties[176] and General Assembly resolution 57/150 of 27 February 2003 urge affected States to reduce formalities in order to facilitate entry of goods and equipment. With respect to waiving tariffs, duties or import taxes, the Inter-American Convention also includes a provision (art. V) waiving "taxes, fees, and other charges" for vehicles, equipment and supplies. The ASEAN Agreement and the BSEC Agreement contain similar provisions.[177]

141. The fourth instance when national laws must be amended or waived concerns national laws and regulations related to quality of goods and equipment imported for disaster relief. As noted in the Memorandum by the Secretariat, waiver of laws related to quality is for the purpose of "ensur[ing] that existing laws and regulations in place to assure quality in various settings do not have the effect of limiting

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[171] See, for example, Nuclear Accident Convention, art. 9; ASEAN Agreement, art. 16 (1); Oslo Guidelines, para. 63; CDERA Agreement, art. 22.

[172] See Inter-American Convention, art. VII (a); Tampere Convention, art. 9 (4); ASEAN Agreement, art. 14 (b).

[173] Convention on Temporary Admission ("Istanbul Convention"), of 26 June 1990, United Nations, *Treaty Series*, vol. 1762, No. 30667, art. 2.

[174] Kyoto Convention, Specific Annex J (5), art. 2.

[175] Tampere Convention, art. 9 (4); ASEAN Agreement, art. 14 (b). See also the 1976 ASEAN Declaration, para. III (b).

[176] See, for example, the Agreement on Cooperation and Mutual Assistance in Cases of Accidents, of 26 June 1995, Estonia-Finland, United Nations, *Treaty Series*, vol. 1949, No. 33393, art. 9; and the Convention on Mutual Assistance between French and Spanish Fire and Emergency Services, of 14 July 1959, updated by the Protocol of 8 February 1973, United Nations, *Treaty Series*, vol. 951, No. 13576, art. II.

[177] ASEAN Agreement, art. 14 (a); Agreement on Cooperation Across State Frontiers to Prevent or Limit Damage to Persons or Property or to the Environment in the Case of Accidents, of 20 January 1989, United Nations, *Treaty Series*, vol. 1777, No. 31001, art. 3 (3); BSEC Agreement, art. 10. See also Oslo Guidelines, art. 60.

effective disaster relief operations" (A/CN.4/590, para. 201). Some agreements exempt goods imported for the purpose of disaster relief from any national regulation entirely.[178] The Agreement between the Republic of Austria and the Federal Republic of Germany Concerning Mutual Assistance in the Event of Disasters or Serious Accidents of 23 December 1988,[179] the International Red Cross and Red Crescent Movement[180] and the UNITAR Model Rules (annex A, rule 7) suggest that affected States may have to waive import restrictions, such as for certain medical products. Some instruments require waiver for rescue animals and food restrictions.[181]

142. The final instance when national laws may be waived in the event of a natural disaster concern freedom of movement. Some international law instruments only require a State to remove internal obstacles to assisting actors entering the disaster area. The UNITAR Model Rules provide that an affected State must permit assisting "personnel freedom of access to, and freedom of movement within, disaster stricken areas that are necessary for the performance of their specifically agreed functions".[182] The 2003 resolution on humanitarian assistance adopted by the Institute of International Law includes a similar provision.[183]

143. Although some national laws encourage opening disaster areas to assisting actors,[184] other States continue to place restrictions on assisting actors in their national laws or regulations. Japanese law allows local officials to prohibit the entry of non-emergency personnel in the event of danger to personnel.[185] The law of Nepal includes a provision allowing the Government to require assisting actors to receive permission before entering a disaster area.[186]

144. Some international instruments suggest that the affected State may have an obligation to facilitate entry into the disaster area. The General Assembly, in resolution 46/182 (annex, para. 35 (d)), required the United Nations Emergency Relief Coordinator to facilitate "the access by the operational organizations to emergency areas for the rapid provision of emergency assistance by obtaining the consent of all parties concerned". A small number of bilateral agreements require that the affected State permit and facilitate access to a disaster area, and even provide transportation to assisting actors.[187]

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[178] See, for example, the Agreement on Mutual Assistance in the Event of Disasters or Serious Accidents (with exchange of notes), Denmark-Federal Republic of Germany, of 16 May 1985, United Nations, *Treaty Series*, vol. 1523, No. 26375, art. 5 (5); IFRC Guidelines, art. 17 (1) (b).

[179] United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 7 (5).

[180] Measures to Expedite International Relief. See footnote 153 above.

[181] See, for example, Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies, of 6 December 2001, art. 8 (2); Measures to Expedite International Relief, recommendation D; UNITAR Model Rules, annex A, rule 7.

[182] Ibid., annex A, rule 16.

[183] Institute of International Law, Bruges session, 2 September 2003, sect. VII, para. 3.

[184] Order No. 48/1999 (XII.15) of the Minister of the Interior on the disaster protection tasks of organs subordinated to the Minister of the Interior (Hungary), sect. 15 (3) (c) and (d); Law on Disaster Protection (Mongolia), art. 30 (2).

[185] Disaster Countermeasures Basic Act, June 1997 (Japan), art. 63.

[186] An Act to Provide for the Relief Work relating to the Natural Calamity, 1982 (Nepal), para. 4 a.

[187] See, for example, Agreement concerning the United States relief assistance to the Chinese people (with exchange of notes), of 27 October 1947, China-United States of America, United Nations, *Treaty Series*, vol. 12, No. 178, art. V (a) and (b).

145. Although it is reasonable for the national laws described above to be waived in some circumstances, an absolute requirement that those laws be waived in every circumstance would prevent a State from exercising its sovereignty to protect its population and persons within its territory and control. For example, an absolute requirement of waiver of quality regulations might interfere with an affected State's duty to protect its population from goods that the State in good faith believes to be harmful. The balance between the need to facilitate timely assistance while also preserving minimum standards concerning the quality of assistance is reflected in the Max Planck Guidelines, which urge States to "waive any prohibitions, restrictions or regulations which would otherwise delay the importation of humanitarian assistance consignments, *to the extent compatible with reasonable health and safety standards*".[188] Therefore, rather than a strict and absolute requirement of waivers in a natural disaster, the affected State should consider the reasonableness of the waiver under the circumstances and balancing its obligations to provide prompt and effective assistance and to protect its population.

B. Identifiable needs and quality control

146. Affected States may condition the provision of assistance on the identifiable needs of the persons concerned and the quality of assistance, in furtherance of the purpose of the present draft articles "to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned" (A/66/10, para. 288, art. 2). The Commission has emphasized the discretionary power of the affected State to choose the assistance "most appropriate to its specific needs" in the commentary to draft article 10.[189] In exercising this discretionary power and in accordance with the principle that the affected State's Government is "best placed to determine the gravity of an emergency situation and to frame appropriate response policies",[190] the affected State should undertake a needs assessment. The affected State may impose quality conditions for the provision of assistance to ensure that its identified needs are effectively met. In reference to draft article 2 explaining the purpose of the present draft articles, "the link between a high-quality ('adequate and effective') response and meeting the needs of the persons concerned" was underlined in the Commission.[191] The affected State should facilitate the provision of high-quality, effective assistance by specifying the scope and type of assistance requested, in line with its duty to cooperate under draft article 5 (A/66/10, para. 288, art. 5).

1. Identifiable needs

147. The affected State's right to condition the provision of assistance on identifiable needs enables the State to ensure the protection of persons on its territory. Thus, the ability to condition the provision of assistance on identifiable

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[188] Max Planck Guidelines, para. 21 (b) [emphasis added].

[189] A/66/10, para. 288, art. 10, para. (10). ("The phrase 'as appropriate' was adopted by the Commission to emphasize the discretionary power of an affected State to choose from among various States, the United Nations, competent intergovernmental organizations, and relevant non-governmental organizations the assistance that is most appropriate to its specific needs.").

[190] Ibid., art. 9, para. (4). ("The primacy of an affected State is also informed by the long-standing recognition in international law that the government of a State is best placed to determine the gravity of an emergency situation and to frame appropriate response policies.").

[191] Statement by the Chairman of the Drafting Committee, 2009 (A/CN.4/SR.3029), p. 5.

needs allows fulfilment of draft article 9, which recognizes the affected State's primary role in directing, controlling and coordinating disaster relief on its territory. The State's ability to condition assistance on identifiable needs is also fully consistent with the principles of humanity, neutrality and impartiality identified in draft article 6 and the duty to cooperate recognized in draft article 5.

148. According to the Secretariat's Memorandum, conditioning disaster relief assistance on identifiable needs is a valid constraint on the provision of such assistance.[192] Multilateral instruments regulating the provision of relief assistance emphasize the importance of allocating assistance directly in proportion to needs.[193] Article 72 of the Cotonou Agreement, for example, establishes a general requirement that humanitarian and emergency assistance be granted "exclusively according to the needs and interests of victims of disasters". Similarly, the General Assembly, in paragraph 2 of resolution 54/233, provided that humanitarian assistance for natural disasters "should be determined on the basis of the human dimension and needs arising out of the particular natural disaster". In the particular context of food supplies, the Food Aid Convention submits (art. III (j)) that food aid should be "consistent with the dietary habits and nutritional needs of recipients".

149. A number of model rules and draft guidelines reiterate the emphasis on allocation of assistance in proportion to needs.[194] In explaining the rationale for inclusion of the phrase "as appropriate" in draft article 10 on the duty of the affected State to seek assistance, the Commission notes that it sought to emphasize the discretion of an affected State to choose "assistance that is most appropriate to its specific needs" from among different assisting entities.[195] Under the IFRC Guidelines, assisting actors should calculate aid priorities "on the basis of need alone",[196] disaster relief should be "[a]dequate for the needs of affected persons"[197] and assisting States and organizations should inspect all goods and equipment to ensure "appropriateness for the needs in the affected State".[198] The UNITAR Model Rules (annex A, rule 2 (2)) require that the assisting State consult with the affected State "with respect to the needs of the receiving State". The Mohonk Criteria state that assistance should be allocated in proportion to needs.[199] The Max Planck Guidelines likewise stipulate that humanitarian assistance should be "suitable for meeting the assessed needs in every respect".[200]

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192 A/CN.4/590, para. 76.

193 Partnership Agreement between the members of the African, Caribbean and Pacific groups of States on the one part, and the European Community and its member States, on the other part, signed in Cotonou, Benin, on 23 June 2000, *Official Journal of the European Communities*, vol. 43, No. L-317 (15 December 2000), p. 3, art. 72; Food Aid Convention, of 13 April 1999, United Nations, *Treaty Series*, vol. 2073, No. 32022, art. VIII (a). Hereinafter Food Aid Convention; General Assembly resolution 54/233 of 22 December 1999, para. 2.

194 A/66/10, para. 10. See also IFRC Guidelines, arts. 4 (2), 4 (3) and 17 (3); UNITAR Model Rules, annex A, rule 2 (2); "The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance", reprinted in *Human Rights Quarterly*, vol. 17, No. 1 (1995), pp. 192-198, art. 15. Hereinafter Mohonk Criteria.

195 A/66/10, para. 288, art. 10, commentary, para. (10).

196 IFRC Guidelines, art. 4 (2).

197 Art. 4 (3).

198 Ibid., art. 17 (3).

199 Mohonk Criteria, sect. III.2 (a).

200 Max Planck Guidelines, art. 15.

150. Although numerous texts support the principle of needs-based allocation of disaster relief assistance, other factors have been mentioned in the Sixth Committee which might validly influence the distribution of relief assistance, including economic considerations relating to the capability to provide assistance and the importance of assessing proportionality of needs on a case-by-case basis (A/65/10, para. 312). In addition, it has been noted that the General Assembly, in paragraph 2 of resolution 54/233, envisioned consideration of the "human dimension", implying that allocation of humanitarian assistance is not limited to a strict proportional provisioning of resources based on need.

2. Needs assessment

151. An affected State that conditions the provision of assistance on its linkage to identifiable needs must clearly identify such needs. It has been noted that an affected State may undertake a needs assessment on its own or jointly in cooperation with an assisting State (A/CN.4/590, para. 80). Cooperation between States in undertaking needs assessments reflects the duty to cooperate enshrined in draft article 5, A/66/10, para. 288, art. 5. The ASEAN Agreement, in article 11 (3), provides that the affected State shall either specify the assistance required to the assisting entity or, if this is not practicable, assess and decide upon the assistance required, jointly and in consultation with the assisting entity. The Food Aid Convention, in article VIII (b), also foresees an "evaluation of needs by the recipient and the members, within their own respective policies", in order to determine the provision of food aid. That instrument further provides, in article VIII (g), that States parties should seek to develop a "common approach to needs analysis" by consulting with each other at the regional and recipient State level when food aid needs are identified. Likewise, the process described by the UNITAR Model Rules (annex A, rule 2 (2)) involves the assisting State consulting with the designated national authority of the receiving State.

152. A role is also envisioned for humanitarian agencies in needs assessments. The Economic and Social Council, in paragraph 8 of resolution 2002/32, encouraged humanitarian agencies to strengthen humanitarian information centres by "providing timely and accurate information on assessed needs, and the activities developed to respond to them". Accordingly, the International Recovery Platform conducts Post-Disaster Needs Assessments, which harmonize the assessment, analysis and prioritization of needs by various stakeholders.[201] The Balkan National Societies' Recommended Rules and Practices suggest that States "ascertain the needs of the victims for humanitarian assistance and their number" alongside "competent international relief agencies which offer their assistance".[202] Along these lines, since 1991, the United Nations Office for the Coordination of Humanitarian Affairs has facilitated the implementation of Common Humanitarian Action Plans based on needs assessments and other strategic planning.[203]

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[201] International Recovery Platform, Post-Disaster Needs Assessment, available from www.recoveryplatform.org/pdna.

[202] Recommended Rules and Practices, Balkan National Societies meeting on international disaster response law, Belgrade, 24-26 September 2004, sect. II (2).

[203] Office for the Coordination of Humanitarian Affairs, Consolidated Appeal Process, available from http://unocha.org/cap/.

153. It should be noted that a needs assessment is not limited to the context where the affected State has conditioned provision of assistance on linkage to identified needs. It has been stated that a needs assessment is appropriate where an instrument requires the affected State to specify the scope and type of assistance requested (A/CN.4/590, para. 80). In such a case, the needs assessment forms the basis of the information provided regarding the scope and type of assistance (ibid.).

3. Quality control

154. International instruments provide that the affected State may condition aid on quality including, inter alia, safety,[204] nutrition and cultural appropriateness, encouraging members of the public to assist States in providing only those relief goods requested by the affected State and discouraging the provision of unnecessary or inappropriate goods.[205] The ASEAN Agreement, for example, provides in article 12 (4), that "[t]he relief goods and materials provided by the Assisting Entity should meet the quality and validity requirement of the Parties concerned for consumption and utilization". Article III (j) of the Food Aid Convention declares that "[a]ll products provided as food aid shall meet international quality standards, be consistent with the dietary habits and nutritional needs of recipients and, with the exception of seeds, shall be suitable for human consumption".

155. The Secretariat's Memorandum has explained that "certain provisions aim to assure that disaster relief assistance is of a sufficiently high quality as to provide a benefit, rather than a potential harm, to recipients. Under this general concept of quality, many different provisions exist, including those seeking to assure that disaster relief is geographically and culturally relevant, that it is timely, and that it is coordinated so as to assure non-redundancy of assistance" (A/CN.4/590, para. 194).

156. The ability of an affected State to condition the provision of aid on quality is not limited to the quality of the goods themselves, but also applies to the quality of assistance workers deployed in the affected State. The General Assembly, in resolution 57/150, urged States to deploy search and rescue teams that complied with internationally developed standards including training, equipment and cultural awareness.[206] The IFRC Guidelines expand on the notion of quality conditions to

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[204] IFRC Guidelines, art. 18 (3) ("Assisting States and eligible assisting humanitarian organizations should take all reasonable steps to ensure the quality, appropriateness and safety of any such medications and equipment. …").

[205] Ibid., art. 5 (2) ("All States should actively encourage members of the public interested in contributing to international disaster relief or initial recovery to make financial donations where possible or otherwise donate only those types of relief goods expressly requested by the affected State.").

[206] General Assembly resolution 57/150 of 16 December 2002, para. 5 ("*Further urges* all States that have the capacity to provide international urban search and rescue assistance to take the necessary measures to ensure that international urban search and rescue teams under their responsibility are deployed and operate in accordance with internationally developed standards as specified in the Guidelines of the International Search and Rescue Advisory Group, particularly concerning timely deployment, self-sufficiency, training, operating procedures and equipment, and cultural awareness.").

include quality of coordination efforts, consistent with draft article 5, and quality of personnel.[207]

4. Scope and type

157. As a corollary to draft articles 5 and 9, the affected State should specify the scope and type of assistance it is seeking if the provision of assistance is conditioned on quality. As has been previously explained, "certain bilateral treaties contain a provision to the effect that 'the Party requesting assistance must specify the nature and scope of the assistance which it requires and must, to the extent possible, provide the other Party with the information which the other Party needs in order to determine the scope of the assistance'" (A/CN.4/590, para. 199). Providing assisting States with relevant information specifying the type and scope of the conditions on quality both helps to facilitate the affected State's duty to protect its citizens and take the lead in relief efforts under draft article 9 and also to cooperate with assisting States, as provided by draft article 5.

158. In upholding the duty to protect victims of natural disasters and the duty to cooperate with assisting States, when requesting assistance the affected State shall specify the scope and type of assistance it is requesting. The Tampere Convention provides that "[a] State Party requesting telecommunication assistance shall specify the scope and type of assistance required".[208] The ASEAN Agreement (art. 11 (3)) requires the affected State to "specify the scope and type of assistance required and, where practicable, provide the Assisting Entity with such information as may be necessary for that Party to determine the extent to which it is able to meet the request". As noted previously in the discussion relating to needs assessment, the ASEAN Agreement also acknowledges, consistent with draft article 9, that in many instances the affected State may not be capable of specifying scope and type of assistance required and in such instance, assisting States shall collaborate in the needs assessment as it relates to quality.[209]

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[207] IFRC Guidelines, art. 4 (3) ("To the greatest extent practicable, their disaster relief and initial recovery assistance should also be: … (b) Adequate for the needs of affected persons and consistent with any applicable international standards of quality; (c) Coordinated with other relevant domestic and assisting actors; (d) Provided and conducted in a manner that is sensitive to cultural, social and religious customs and traditions … (f) Provided by competent and adequately trained personnel.").

[208] Tampere Convention, article 4 (2). This also reiterates the IFRC Guidelines, art. 1 (3) ("While affirming the principal role of domestic authorities and actors, they recommend minimum legal facilities to be provided to assisting States and to assisting humanitarian organizations that are willing and able to comply with minimum standards of coordination, quality and accountability.").

[209] ASEAN Agreement, art. 11 (3) ("In the event that it is not practicable for the Requesting Party to specify the scope and type of assistance required, the Requesting Party and Assisting Entity shall, in consultation, jointly assess and decide upon the scope and type of assistance required."). See also Nuclear Accident Convention, art. 2 (2) (reiterating that "[a] State Party requesting assistance shall specify the scope and type of assistance required and, where practicable, provide the assisting party with such information as may be necessary for that party to determine the extent to which it is able to meet the request. In the event that it is not practicable for the requesting State Party to specify the scope and type of assistance required, the requesting State Party and the assisting party shall, in consultation, decide upon the scope and type of assistance required").

159. Other international instruments place the onus of consultation and coordination on the assisting, rather than the affected, State. The Inter-American Convention provides that "[u]pon the occurrence of a disaster the assisting State shall consult with the assisted State to receive from the latter information on the kind of assistance considered most appropriate to provide to the populations stricken by the disaster".[210] Bilateral treaties also acknowledge, as explained above in section V.B.2 — concerning the discussion of linking aid to needs on a case-by-case rather than directly proportional basis — that a case-by-base analysis that does not include operational detail may also be appropriate.[211]

160. The IFRC Guidelines place a reciprocal duty on both assisting States and affected State to specify the scope, type and needs of assistance that are available and offered or needed and sought. Article 10 (2) of the IFRC Guidelines declares that "[r]equests and offers for assistance should be as specific as possible as to the types and amounts of goods as well as the services and expertise available or required, respectively. Affected States may also wish to indicate particular types of goods and services likely to be offered that are not needed". This reciprocal duty is most consistent with the importance of cooperation among States underlying draft article 5 and with the reality that the victims of natural disasters in the affected State may benefit from quality specification coming from assisting States, thus further enabling the affected State to fulfil its duty under draft article 9.

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[210] Inter-American Convention to Facilitate Disaster Assistance, art. II (b). This is in contrast to the Transboundary Effects Convention, art. 12 (1), for example, which places the onus of specifying the scope and type of aid on the affected State: "If a Party needs assistance in the event of an industrial accident, it may ask for assistance from other Parties, indicating the scope and type of assistance required". See also BSEC Agreement, art. 4 (2) ("The Assistance shall be provided upon request, wherein the Requesting Party specifies: – place, time, character and scale of the Disaster, and current state of the Emergency in the afflicted area; – actions already carried out, specification of the required Assistance, setting the priorities of the requested Disaster Relief."); Agreement on Cooperation and Mutual Assistance in Cases of Accidents, of 26 June 1995, Estonia-Finland, United Nations, *Treaty Series*, vol. 1949, No. 33393, art. 6 ("The Party requesting assistance must specify the nature and scope of the assistance which it requires."); Protocol between the Kingdom of Spain and the Portuguese Republic on Technical Cooperation and Mutual Assistance in the Field of Civil Defence, of 9 March 1992, United Nations, *Treaty Series*, vol. 1730, No. 30218, art. 3 (7) ("The overall management of operations shall, in all cases, be the responsibility of the authorities of the territory in which the disaster occurs. Nevertheless, the units of the donor country shall act through their own national leaders, whom the head of the expedition shall apprise of the objectives and missions to be accomplished.").

[211] See Agreement on reciprocal assistance in case of disasters or major accidents, of 14 January 1987, France-Switzerland, United Nations, *Treaty Series*, vol. 1541, No. 26743, art. 4 ("The nature, extent and procedures for the provision of assistance shall be determined by mutual agreement between the authorities mentioned in article 3, on a case-by-case basis."); Agreement between the Republic of Austria and the Federal Republic of Germany concerning mutual assistance in the event of disasters or serious accidents, of 23 December 1988, United Nations, *Treaty Series*, vol. 1696, No. 29224, art. 4 ("The type and extent of assistance to be provided shall be agreed upon by the authorities referred to in article 3 case by case, without necessarily going into operational detail."). See also Council of the European Union decision 2001/792/EC, Euratom, of 23 October 2001, art. 5 (3) (explaining specific limitations and details of execution of assistance intervention shall only be provided by the affected State when necessary: "The requesting Member State shall be responsible for directing assistance interventions. The authorities of the requesting Member State shall lay down guidelines and, if necessary, define the limits of the tasks entrusted to the intervention teams, without giving details of their execution, which are to be left to the person in charge appointed by the Member State rendering assistance").

C. Limitations on conditions under international and national law

161. The right of the affected State to impose conditions for the delivery of assistance is qualified by an obligation that such conditions comply with international and national laws[212] as well as treaty obligations.[213] Although such provisions textually modify general requirements for the delivery of aid, they have a clear application to the conditions an affected State may impose on assisting States, because an affected State is not to require actions in contravention of obligations otherwise stated. Consequently, although an affected State may impose conditions, including the retention of control over the provision of assistance and requirements that any assistance comply with specific national laws, such conditions may not abrogate otherwise existing duties under national and international law.[214] Further, such conditions may not contravene the provisions of any treaties, conventions or instruments to which the affected State is a party.[215] Rather, where discrepancies between agreements to which either the affected or the assisting States are parties, conditions on the provision of assistance should conform with those provisions that "afford[ed] the greatest degree of assistance in the event of disaster and favor[ed] support and protection to personnel providing assistance" (Inter-American Convention, art. XV).

162. The Special Rapporteur noted in his third report that State sovereignty rights with respect to emergency assistance must be balanced against other obligations under international law principles (A/CN.4/629, paras. 15-20), most particularly, the humanitarian principles of humanity, neutrality and impartiality as embodied by the Commission in draft article 6 (humanitarian principles in disaster response),[216] as well as human dignity (draft article 7) and human rights (draft article 8) (A/66/10,

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212 General Assembly resolution 46/182, annex, para. 5 (noting that assistance "should be provided in accordance with international law and national laws"). See also IFRC Guidelines, art. 4 (1), ("Assisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times."); Max Planck Guidelines, para. 9 (b) ("Humanitarian assistance shall only be provided in accordance with the principles and rules of international law.") and 22 (d) ("assisting personnel [shall] respect the laws of the domestic State"); United Nations Convention on the Rights of Persons with Disabilities, art. 11 (requiring States to take measures "in accordance with their obligations under international law").

213 ASEAN Agreement, art. 30 ("The provisions of this Agreement shall in no way affect the rights and obligations of any Party with regard to any existing treaty, convention or instrument to which they are Parties."); Inter-American Convention, art. XV ("If there is any discrepancy between this Convention and other international agreements on the subject to which the assisting and assisted states are parties, the provision that affords the greatest degree of assistance in the event of disaster and favors support and protection to personnel providing assistance shall take precedence.").

214 General Assembly resolution 46/182, annex, para. 5 (requiring that assistance "should be provided in accordance with international law and national laws"). See also IFRC Guidelines, art. 4 (1) ("Assisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times."); Max Planck Guidelines, paras. 9 (b) and 22 (d) (providing that "[h]umanitarian assistance shall only be provided in accordance with the principles and rules of international law" and "assisting personnel [shall] respect the laws of the domestic State"); Convention on the Rights of Persons with Disabilities, art. 11 (requiring States to take measures "in accordance with their obligations under international law").

215 ASEAN Agreement, art. 30.

216 See also General Assembly resolution 46/182, annex, para. 2; IFRC Guidelines, art. 4 (2).

para. 288). Further, the Commission has found that such principles should not be construed in a limiting fashion — as only those explicitly enshrined in international agreements — but rather as "obligations applicable on States by way of customary international law, [including] assertions of best practices".[217] Consequently, State obligations under international law pertaining, inter alia, to the environment and sustainable development may also serve to circumscribe the conditions an affected State may impose for the provision of assistance. Where the national laws of an affected State provide protections in excess of international standards and the affected State has not agreed to waive such additional protections in order to facilitate the delivery of assistance, assisting States must comply with the national laws of the affected State.[218] Applicable principles that may serve to balance the right of an affected State to impose conditions on the delivery of assistance are detailed below.

1. Core humanitarian obligations

163. As stated in paragraph 2 of the Guiding principles found in the annex to General Assembly resolution 48/182, "[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality". That formulation reflects the language of the Secretary-General in his 2009 report entitled "Strengthening the coordination of emergency humanitarian assistance of the United Nations" (A/64/84-E/2009/87, para. 23):

> "Respect for and adherence to the humanitarian principles of humanity, neutrality, impartiality and independence are therefore critical to ensuring the distinction of humanitarian action from other activities, thereby preserving the space and integrity needed to deliver humanitarian assistance effectively to all people in need."

164. These humanitarian principles are discussed extensively in the Special Rapporteur's third report (A/CN.4/629, paras. 14-50). They are found in a number of documents,[219] including the Fundamental Principles of ICRC.[220] The 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), provides that: "States Parties shall uphold and ensure respect for the humanitarian principles of humanity, neutrality, impartiality, and independence of humanitarian actors".[221] Conditions set by affected States on the acceptance of aid must not contravene those principles.

165. States may not impose conditions for the provision of assistance that do not comport with the principle of humanity. This principle initially developed in

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217 Statement by the Chairman of the Drafting Committee on 20 July 2010 (see A/CN.4/SR.3067).

218 See, for example, General Assembly resolution 46/182, annex, para. 5 (requiring that assistance "be provided in accordance with international law and *national laws*") [emphasis added]; IFRC Guidelines, art. 4 (1) ("Assisting actors and their personnel should abide by the law of the affected State."); and Max Planck Guidelines, para. 22 (d) ("assisting personnel [shall] respect the laws of the domestic State").

219 See A/CN.4/629, para. 18, and footnote 18; 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, available from www.ifrc.org/en/publications-and-reports/code-of-conduct/ (with 492 signatories at time of writing).

220 ICRC, The Fundamental Principles of the Red Cross: Commentary, 1979, available from www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm.

221 Kampala Convention, adopted on 22 October 2009, art. 5, para. 8.

humanitarian law,[222] but has since been recognized as applying in both war and peace. In the *Corfu Channel* case, the International Court of Justice found that the obligations incumbent on State authorities were based "on certain general and well-recognized principles, namely: elementary considerations of humanity, more exacting in peace than in war".[223]

166. The principle of humanity is extended to the context of disaster relief by the Oslo Guidelines and the Mohonk Criteria, which affirm that "human suffering must be addressed wherever it is found".[224] The dignity and rights of all victims must also be respected and protected.[225] The Kampala Convention, in article 3 (1), para. (c), requires that States Parties "respect and ensure respect for the principles of humanity and human dignity of internally displaced persons". Humanity is a fundamental principle of IFRC,[226] and its Guidelines (art. 4 (1)) recommend that: "[a]ssisting actors and their personnel should abide by the law of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times". The principle of humanity, therefore, requires that affected States, in imposing conditions for the provision of aid, do so only in ways that respect the human dignity of those affected.

167. Conditions imposed for the provision of aid by an affected State must adhere to the principle of neutrality. The principle of neutrality is described by the Red Cross and Red Crescent Movement as the notion that "[h]umanitarian assistance should be provided without engaging in hostilities or taking sides in controversies of a political, religious, or ideological nature".[227] This wording is echoed in the Mohonk Criteria.[228] It is clear from this formulation that neutrality is relevant in disaster situations, and not merely in the context of conflict.[229] In his third report, the Special Rapporteur noted that "the affected State must respect the humanitarian nature of the response activities and 'refrain from subjecting it to conditions that

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222 See, for example, the Convention (III) relative to the Treatment of Prisoners of War (12 August 1949), art. 3 (1), para. (c); the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, St. Petersburg, 11 December 1868; Convention (II) with respect to the Laws and Customs of War on Land, 29 July 1899, preamble.

223 *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment* of 9 April 1949, *I.C.J. Reports 1949*, p. 22.

224 See Oslo Guidelines, para. 20; Mohonk Criteria, p. 196.

225 Mohonk Criteria, p. 196; ICRC Fundamental Principles, available from www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm#a3.

226 IFRC, "The Seven Fundamental Principles", available from www.ifrc.org/en/who-we-are/vision-and-mission/the-seven-fundamental-principles/.

227 Resolution IX of the twentieth International Conference of the Red Cross (Vienna, 1965).

228 See footnote 194 above.

229 See, for example, Council of the International Institute of Humanitarian Law, "Guiding principles on the right to humanitarian assistance", April 1993, preambular para. 5 ("Stressing that humanitarian assistance, both as regards those granting and those receiving it, should always be provided in conformity with the principles inherent in all human activities; the principles of humanity, neutrality, and impartiality, so that political considerations should not prevail over those principles."). See also D. Plattner, "ICRC neutrality and neutrality in humanitarian assistance", *International Review of the Red Cross*, No. 311, 1996, p. 165 ("Returning to the essence of neutrality and allowing it a scope which encompasses its possible implications in peacetime, neutrality may therefore be understood as a duty to abstain from any act which, in a conflict situation, might be interpreted as furthering the interests of one party to the conflict or jeopardizing those of the other.").

divest it of its material and ideological neutrality'".[230] Therefore, conditions set by affected States on the acceptance of aid must be "neither partisan or political acts nor substitutes for them" (A/CN.4/629, para. 28).

168. The incidence of a disaster does not absolve an affected State from its obligation to refrain from promulgating conditions for the provision of aid that violate the principle of impartiality. The principle of impartiality, which is commonly understood to include non-discrimination, refers to the doctrine that aid must be provided "without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering of individuals must be guided solely by their needs and priority must be given to the most urgent cases of distress".[231] All human rights instruments take into account the principle of non-discrimination either explicitly or implicitly (ibid., para. 32). For example, the Charter of the United Nations describes, in Article 1, paragraph 3, one of the purposes of the Organization as follows:

> "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

169. Impartiality and non-discrimination are not per se violated, however, by conditions that funnel aid to those with the most urgent needs.[232] Other agreements, such as the Convention establishing an International Relief Union, make explicit the applicability of the principle of non-discrimination in the context of disaster relief.[233] Non-discrimination is addressed specifically in the context of emergency situations in the International Covenant on Civil and Political Rights, which allows suspension of certain obligations "provided that such measures ... do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".[234] It therefore follows that affected States are not free to derogate from the principle of impartiality in conditioning their acceptance of aid.

2. Human rights

170. While States have broad latitude in specifying the kind and extent of assistance they need, they may not place restrictions on assistance that compromise their obligations under international law. Existing human rights obligations under human rights law do not cease in the wake of a disaster. As outlined by the Special Rapporteur in his fourth report, disasters implicate numerous human rights, such as the rights to food and water and the right to adequate housing (see A/CN.4/643, para. 32).

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[230] A/CN.4/629, para. 29 (quoting Ruth Abril Stoffels, "Legal regulation of humanitarian assistance in armed conflicts: achievements and gaps", *International Review of the Red Cross*, vol. 86, No. 855, p. 539).

[231] Mohonk Criteria, p. 196; Resolution IX of the twentieth International Conference of the Red Cross (Vienna, 1965).

[232] ICRC Fundamental Principles, Commentary, available from www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm#a3.

[233] League of Nations, *Treaty Series*, vol. 135, p. 247, art. 3. See also Framework Convention on Civil Defence Assistance, United Nations, *Treaty Series*, vol. 2172, No. 38131, art. 3 (c); BSEC Agreement, art. 3, para. 1 (see footnote 140 above).

[234] International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, No. 14668, art. 4.

The affected State may not impose restrictions on assistance that will violate or infringe upon those rights.

171. Similarly, a State's obligations to vulnerable or disadvantaged groups, such as women, children, people with disabilities and indigenous or minority cultural groups, continue to apply in a disaster situation.[235] In fact, disaster situations may impose added duties on States to ensure the safety of vulnerable populations. For instance, the Convention on the Rights of Persons with Disabilities requires, in article 11, that States take "all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including ... the occurrence of natural disasters".[236]

172. The Hyogo Framework for Action 2005-2015 underscores the importance of human rights considerations in the disaster-planning process, urging States to adopt "a gender perspective" in disaster risk management and to take into account "cultural diversity, age, and vulnerable groups" in disaster risk reduction.[237] To the extent that humanitarian assistance contributes to disaster planning and risk management, affected States must condition acceptance on the assurance that the aid will provide adequately for vulnerable groups.

3. Reconstruction and sustainable development

173. In its commentary to draft article 1 on Scope (A/65/10, para. 331, para. (4)), the Commission indicated that the scope *ratione temporis* "is primarily focused on the immediate post-disaster response and recovery phase, including the post-disaster reconstruction phase". To the extent that reconstruction is a continuation of relief efforts, and starts almost immediately after a disaster occurs, sustainable development considerations might come into play early in the disaster response process and merit, therefore, some brief reference here. This is not to ignore that reconstruction remains different from relief work and that the rights and obligations of States in the two contexts may differ considerably. When assistance will contribute to reconstruction efforts, the affected State may be required to condition its acceptance on the assurance that reconstruction will ameliorate, not just restore, previous conditions. For instance, the International Covenant on Economic, Social and Cultural Rights identifies, in article 11, paragraph 1, the universal right to "housing, and to the continuous improvement of living conditions".[238] Improving living conditions in the wake of a disaster that has destroyed settlements may require an affected State to ensure that new housing will be more resilient to future disasters and that future land use decisions will not perpetuate vulnerabilities.

174. Similarly, the international goal of sustainable development is highlighted in the wake of a disaster. As the Hyogo Framework for Action notes, in paragraph 13, "disaster risk reduction is a cross-cutting issue in the context of sustainable development and therefore an important element for the achievement of internationally agreed[-upon] development goals". Those goals have been set in principle 4 of the Rio Declaration on Environment and Development, which

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[235] Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, No. 20378; Convention on the Rights of the Child, United Nations, *Treaty Series*, vol. 1577, No. 27531.

[236] See footnote 129 above.

[237] See footnote 155 above.

[238] See footnote 133 above.

provides that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[239]

175. Agenda 21,[240] adopted at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, echoes this principle, setting forth as a broad objective the promotion of "human settlement development through environmentally sound physical planning and land use". Furthermore, in the disaster context, it recognizes the importance of post-disaster reconstruction in "mitigat[ing] the negative impact of natural and man-made disasters on human settlements, national economies and the environment". Likewise, Agenda 21 views the international community "as a major partner in post-[disaster] reconstruction and rehabilitation", by providing funds and expertise to affected States to develop long-term disaster planning and mitigation policies.

176. The Millennium Declaration lists respect for nature as a "fundamental value" "essential to international relations", and asserts that "prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development".[241] The Declaration identifies international cooperation "to reduce the number and effects of natural and man-made disasters" as a key means to protecting the environment.[242]

177. The Hyogo Framework for Action also emphasizes, in paragraph 22, the nexus between disaster risk reduction and sustainable development and the importance of cooperation among States and the international community in developing the "knowledge, capacities and motivation needed to build disaster-resilient nations and communities". The Framework further specifies, in paragraph 13, that post-disaster humanitarian assistance should be used "in such a way that risks and future vulnerabilities will be lessened as much as possible". That language suggests that affected States should, to the extent possible, ensure that the assistance they receive will enable them to develop safely and sustainably.

4. Obligations under national laws

178. In addition to complying with international law, conditions on the delivery of assistance must comply with national laws.[243] An affected State may condition its acceptance of aid on compliance with its national laws.[243] Affected States also have an obligation to follow their own national laws when they set conditions for the provision of aid. This obligation derives from the well-established duty to respect the rule of law.[244] This obligation does not restrict the ability of affected States to modify or waive certain laws when necessary to facilitate the provision of aid.

179. International law requirements restricting conditions that may be imposed by affected States constitute a baseline for the obligations of affected States to their

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[239] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

[240] Ibid., resolution 1, annex II, paras. 7.28, 7.58 and 7.62.

[241] General Assembly resolution 55/2 of 8 September 2000, para. 6.

[242] Ibid., para. 23.

[243] See General Assembly resolution 46/182, annex, para. 5.

[244] Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), para. 6.

populations, and should not be considered exhaustive. Affected States may enact national laws that provide protections to their populations in excess of international standards and condition their acceptance of aid on compliance with such higher standards. This principle is well supported by the core duty of States to respect the rule of law, which is foundational in the history in international law.[245]

180. Consequently, affected States have a duty to respect and follow their own laws when imposing conditions for the provision of aid. While an affected State may enter into agreements with other States to modify or harmonize its national laws in order to facilitate the provision of external assistance, such agreements may not abrogate national standards for other purposes. Where no such agreement exists, assisting States must comply with the national laws of the affected State, even where they impose higher standards than those existing under international law.

181. Bearing the foregoing considerations in mind, the Special Rapporteur proposes the following draft article:

Draft article 13
Conditions on the provision of assistance

The affected State may impose conditions on the provision of assistance, which must comply with its national law and international law.

VI. Termination of assistance

182. The draft articles adopted thus far provide a framework for the affected State to guide the provision of assistance to suit its needs. Draft article 9 ensures that the affected State maintains direction, control, coordination and supervision of any assistance provided. Draft article 11 gives the affected State the right to refuse an offer of assistance, but not arbitrarily. The foregoing suggests that when an affected State does accept an offer of assistance, it retains a measure of control over the duration for which that assistance will be provided, and assisting actors are correspondingly obliged to leave the territory of the affected State upon request. Both parties remain duty-bound to cooperate according to draft article 5, and the context of termination of the assistance is no exception. The instruments addressing this question echo this duty by routinely articulating a preference for a collaborative approach in which both parties reach an amicable agreement on when the period of assistance will come to an end and the assisting actor will leave the territory.

183. International instruments bearing on this topic have addressed termination of assistance in a number of ways. As the Secretariat Memorandum has acknowledged, "termination provisions contain subtle differences in formulation which could have a significant impact in practice" (A/CN.4/590, para. 247).

184. Several instruments mark the end of the period of assistance with a notification from either party. Thus, the Tampere Convention provides, in article 6 (1), that "The requesting State Party or the assisting State Party may, at any time, terminate telecommunication assistance received or provided ... by providing notification in

[245] Ibid. The Secretary-General has defined the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards".

writing. Upon such notification, the States Parties involved shall consult with each other to provide for the proper and expeditious conclusion of the assistance." The Draft Convention on Expediting the Delivery of Emergency Assistance provides that "[t]he receiving State or an assisting State or organization may give notice of termination of assistance and where necessary the Parties to this Convention which are affected by such notice shall then arrange to bring the assistance to an orderly conclusion under the terms of this Convention".[246] Similarly, article 12 of the IFRC Guidelines states: "When an affected State or an assisting actor wishes to terminate disaster relief or initial recovery assistance, it should provide appropriate notification. Upon such notification, the affected State and the assisting actor should consult with each other ...". The BSEC Agreement[247] and the Agreement Between the Government of the Republic of Mozambique and the Government of the Republic of South Africa Regarding the Coordination of Search and Rescue Services[248] contain similar provisions.

185. A China-United States agreement of 1947 allowed the receiving State to terminate the agreement "whenever it deems that such relief assistance as is provided in this Agreement is no longer necessary", but established a series of conditions necessary for the assisting State to terminate the assistance.[249] The Nordic Mutual Assistance Agreement in Connection with Radiation Accidents[250] provides that a receiving State may request termination of disaster relief assistance "any time", but that the assisting State may only terminate its assistance if, in its opinion, certain conditions are met.

186. Some instruments allow the affected State to request the termination of assistance, after which both parties shall consult with each other to that effect. For example, article 11 of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides that:

> "[t]he requesting State ... may at any time, after appropriate consultations [with the assisting actor] and by notification in writing, request the termination of assistance received ... under this Convention. Once such a request has been made, the parties involved shall consult with each other to make arrangements for the proper conclusion of the assistance."[251]

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[246] Draft Convention on Expediting the Delivery of Emergency Assistance, 1984 (A/39/267/Add.2-E/1984/96/Add.2), annex, art. 18.

[247] BSEC Agreement, art. 13 (1) ("The Requesting Party may cancel its request for assistance at any time. The Requesting Party shall inform the Assisting Party immediately about its decision.").

[248] See Agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa regarding the Coordination of Search and Rescue Services, 2002, art. 12 ("This Agreement may be terminated by either Party giving written notice through the diplomatic channel to the other Party of its intention to terminate this Agreement.").

[249] Agreement concerning the United States relief assistance to the Chinese people (with Exchange of Notes) of 27 October 1947, China-United States of America, United Nations, *Treaty Series*, vol. 12, No. 178, art. IX.

[250] Nordic Mutual Assistance Agreement in Connection with Radiation Accidents of 17 October 1963, Denmark, Finland, Norway and Sweden-International Atomic Energy Agency, United Nations, *Treaty Series*, vol. 525, No. 7585, art. X (1), (3) ("1. The Requesting State may at any time in writing request the termination of the assistance provided under this Agreement. ... 3. Upon such request for, or notice of, termination the Requesting State and the Assisting Party shall consult together with a view to concluding any operations in progress at the time of such termination and facilitating withdrawal of the assistance.").

[251] See footnote 96 above.

The CDERA Agreement (art. 20 (2) and (3)), the Convention on the Transboundary Effects of Industrial Accidents (annex X, para. 10) and the Max Planck Guidelines[252] also include similar provisions.

187. Bearing the foregoing in mind, the Special Rapporteur proposes the following draft article:

Draft article 14
Termination of assistance

The affected State and assisting actors shall consult with each other to determine the duration of the external assistance.

VII. Related developments

188. During the period between the Commission's sixty-third session and the date of the present report, two related developments deserve to be singled out.

189. The third session of the Global Platform for Disaster Risk Reduction was held in Geneva from 8 to 13 May 2011. It built on the findings and recommendations of the Global Platform's second session in 2009, as well as the results of the midterm review of the Hyogo Framework for Action and the 2011 Global Assessment Report on Disaster Risk Reduction.[253] The Platform Chair's Summary highlights consensus points and outlines critical steps to be taken.

190. The 31st International Conference of the Red Cross and Red Crescent was held in Geneva from 28 November to 1 December 2011. On the occasion of the Conference, IFRC made available a pilot version (November 2011) of a "Model Act for the Facilitation and Regulation of International Relief and Recovery Assistance", consisting of 71 articles together with commentaries. It is intended that a final version be produced by the end of 2012. By its resolution No. 7 entitled "Strengthening Disaster Law", the Conference, inter alia, welcomed the efforts to develop a Model Act "to assist States interested in incorporating the recommendations of the IDRL Guidelines into their legal frameworks" (para. 5) and invited "further consultation with States and other stakeholders on the use of the Model Act as a reference tool" (para. 6). As is known, the IFRC International Disaster Response Law (IDRL) project, launched in 2001, developed the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance", adopted at the 30th International Conference in 2007. The IFRC has announced that its IDRL programme has become the IFRC "Disaster Law Programme".

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[252] Max Planck Guidelines, art. 18 ("receiving State ... may determine in consultation with the assisting State or organization the moment of ... termination of such assistance") and art. 23 ("assisting State or organization and the receiving State shall cooperate to resolve any irregularities, difficulties or disputes arising ... upon the termination of humanitarian assistance operations").

[253] United Nations International Strategy for Disaster Reduction, "Revealing Risk, Redefining Development: Global Assessment Report on Disaster Risk Reduction", 2011.